IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-

GEORGE WASHINGTON MILLER,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION OF GEORGE WASHINGTON MILLER

FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

Petitioner George Washington Miller, convicted of aggravated murder and sentenced to die in the electric chair, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on March 9, 1977, whereby his conviction and sentence were affirmed.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 49 Ohio St. 2d 198, 361 N.E.2d 419 (1977), and a copy is included in the appendix hereto. The opinion of the Clark County Court of Appeals is unreported and a copy is included in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 9, 1977. An order extending the time for filing this petition for a writ of certiorari until August 6, 1977, was granted by Mr. Justice Stewart on May 26, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and Part V of the Rules of this Court, petitioner asserting

here and having asserted below a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether petitioner's constitutional right that guilt be proved beyond a reasonable doubt was violated by his conviction on the basis of insufficient fingerprint evidence.

2. Whether the procedure of imposing the sentence of death for the crime of aggravated murder under the law of the State of Ohio violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. Whether petitioner's sentence of death violated his rights under the Eighth and Fourteenth Amendments to the Constitution, because the Ohio death penalty statute does not permit the sentencing authority to consider the weight of evidence of guilt in determining the existence of mitigating circumstances.

4. Whether petitioner's sentence of death violated his rights under the Eighth and Fourteenth Amendments to the Constitution, because the Ohio death penalty statute precluded the sentencing authority from considering petitioner's mental and emotional condition as a mitigating factor.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

> Ohio Rev. Code Ann. Sec. 2903.01. Aggravated murder.
>
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.
>
> * * *
>
> Ohio Rev. Code Ann. Sec. 2929.02. Penalties for murder.
>
> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
>
> * * *
>
> Ohio Rev. Code Ann. Sec. 2929.03. Imposing sentence for a capital offense.
>
> . . . .

(C) . . . If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

. . . .

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

* * *

Ohio Rev. Code Ann. Sec. 2929.04. Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count

in the indictment pursuant to section 2941.14 the Revised Code, and is proved beyond a re sonable doubt:

. . . .

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing, immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is likely that the offense would not have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF THE CASE

Petitioner George Washington Miller, a 26 year-old black man, is one of seventy-two men and three women presently under sentence of death in the State of Ohio. On August 28, 1975, the Clark County, Ohio, grand jury charged petitioner with separate counts of aggravated murder, aggravated burglary, and aggravated robbery. On November 18, 1975, petitioner was convicted of all three counts.

The penalty trial resulting in the death sentence was conducted on December 19, 1975. His sentence and conviction subsequently were reviewed and upheld by a five to two decision of the Ohio Supreme Court, the dissenters concluding that the evidence was insufficient to support the conviction. On March 24, 1977, the Supreme Court of Ohio stayed execution of petitioner's sentence pending disposition of this petition.

Trial on the Charges: The Crime

At trial the State showed that on August 13, 1975, at 2:41 a.m., the Springfield, Ohio police responded to a burglar alarm at a local Twin Fair store, App. pp. 1-2,[1/] and discovered inside the store the body of the store's evening maintenance man. App. p. 5. The victim was shot with .22 caliber bullets, and his own .22 revolver, which he carried at work, was missing from the scene of the crime. App. pp. 13-14. The revolver was never found. App. p. 6. The victim also suffered severe lacerations on the head. App. pp. 34-35. The police found two bloodstained short-handled hatchets near the body. App. pp. 9-10, 19-21. The hatchets and the revolver evidently were the murder weapons. App.

1/ The relevant pages of the trial transcript are reprinted in the appendix hereto. Page references refer to pages in the appendix.

p. 36. The State's pathologist testified that the lacerations and the bullet wounds were inflicted at separate times and from several different directions. App. p. 37. He admitted that it was possible that the victim may have been attacked from different directions at the same time. App. p. 38.

On responding to the burglar alarm, the police discovered the rear hangar door of the store building partly open. App. p. 4. Just outside the door were four gym bags containing store merchandise. App. pp. 2-3. Within the store, but near the hangar door, the police discovered two locks forced open. These locks had been used to fasten the door from the inside. App. p. 11. In this same area was an opened cardboard package containing hacksaw blades. App. p. 11.

Further inside the store, near the victim's body, the police found a long-handled axe. App. p. 12. An adjacent glass display case containing store merchandise was broken, and glass slivers were found on the handle of the axe. App. pp. 24-26. It may be inferred that the axe was used to break the case.

Finally, on an adjacent rooftop, the police discovered a bloodstained shirt and a pair of bloodstained

shoes. App. pp. 7-8. Initially police chemist John Brown testified that the blood on these objects was Type O, App. pp. 18-21, and pathologist Dr. Simeon Palomino testified that the victim's blood was Type A. App. p. 53. When recalled by the State, Mr. Brown changed his testimony so that the blood types were said to coincide. App. pp. 46-47.

Trial on the Charge: The Fingerprint Evidence

The police obtained a total of approximately one hundred fingerprints, App. p. 39, from "many articles" found at the scene of the crime. App. p. 23. These items included objects within the four gym bags, App. p. 40, the cardboard package containing hacksaw blades, App. p. 33-34, one of the blades, App. p. 16, and the long-handled axe, App. pp. 41-42.

The police either did not find or did not identify (the record is silent on this point) any fingerprints on the bloodstained hatchets, on the bloody shirt, or on the bloody pair of shoes found on the adjacent rooftop.

The police searched their local records to match the one hundred fingerprints. After examining by hand approximately five hundred of nearly fifty thousand recorded prints, App. pp. 44-45, the police discovered what they believed to be a match for three of the prints they had obtained. App. p. 30. These three, the State's witness

testified, were petitioner's. App. pp. 28, 29-30, 33-33a. The State based its case against petitioner on virtually nothing other than these three fingerprints. (No witnesses to the crime were produced at trial.)

None of the fingerprints identified by the police as belonging to petitioner related to objects unequivocally involved in the slaying. All the fingerprints were on objects accessible to the public in the course of shopping. The State's fingerprint expert testified that the fingerprints could have lasted a year or more. App. p. 22. The petitioner took the stand, denied that he had anything to do with the killing, and testified that he "visited the store many times". He was there most recently in July 1975, only a month before the crime. App. p. 52.

The first of petitioner's fingerprints was found on a folded paper sack within one of the four gym bags discovered by the police outside the rear hangar door. App. p. 28. Police Officer Nelson Smith testified that the sack was probably normally accessible to shoppers. App. pp. 42a-42b. Furthermore, the police found other fingerprints on the paper sack, but were unable to identify them. App. pp. 42c-42d.

The second print was found on the cardboard packaging of a hacksaw blade package discovered by the police near the rear hangar door. App. pp. 33-34. The package's

plastic covering was open and a third print allegedly belonging to petitioner was found on one of the blades inside the package. App. p. 29. The majority of the Ohio Supreme Court conceded that "it is not clear whether the hacksaw was ever actually used on the locks [of the rear hangar door] to effect an apparent means of escape." App. p. 106. The store manager testified also that the hacksaw packages were handled by customers and were occasionally knocked to the floor by customers. App. pp. 48-49. In addition, as the dissent in the Ohio Supreme Court pointed out, the store manager "admitted that customers did break into packages of the type involved herein and that the policy of placing older items to the front of a display to encourage a quick sale was not strictly followed." App. p. 112. Moreover, the hacksaw package, like most of the objects evidently related to the crime, contained prints which the police failed to identify. App. p. 43.

The only evidence offered by the State, other than the fingerprints, concerned petitioner's shoe type and size. A footprint size 10-1/2 was found near the victim's body, App. p. 27, and the bloody shoes found on the roof appeared to be of this size. App. p. 27a. Petitioner, however, was shown to wear size 9-1/2 shoes. App. pp. 31-32. The State showed also that the desert boots he was wearing at the time

of arrest were similar to the type on sale at the Twin Fair store at the time of the crime. However, the store manager was unable to testify that any of the Twin Fair shoes--any size--were missing. App. p. 54.

Petitioner waived trial by jury. The three-judge panel ruled petitioner guilty of aggravated murder, aggravated burglary, and aggravated robbery.

The Penalty Trial: Petitioner's Background and Character

Prior to the penalty trial, the court requested a pre-sentence investigation and a psychiatric examination of petitioner, pursuant to Ohio Rev. Code § 2929.03(D). These reports were entered into the record at petitioner's penalty trial.

Petitioner has a ninth grade education and a record of sporadic employment in various low-paying jobs. App. pp. 70-71.[2/] His mother died when he was seven years old. When he was 12, his father and stepmother placed him in the Clark County Children's Home. App. p. 63. In 1966, at age 15, he ran away, was caught and was returned. There-

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2/ Relevant portions of the penalty trial transcript, the presentence report, and the psychiatric report are included in the appendix hereto. References are to page numbers in the appendix to this petition. The penalty trial transcript is not a part of the official record of the Supreme Court of Ohio, and the transcript is hereby lodged with this Court.

after he apparently was placed in the Fairfield, Ohio, School for Boys where he remained (with the exception of another sequence of escape, capture and return) until he was deemed an adult at age 18. App. pp. 61-62.

Petitioner is an epileptic. App. p. 68. He has suffered from chronic memory difficulties. App. pp. 83-84. The record does not reveal whether petitioner ever has been psychologically tested, but he was diagnosed by the court-appointed psychiatrist as a chronically depressed neurotic. App. p. 57. He has been institutionalized for mental care in the past and at least once has attempted to kill himself. App. p. 56. Except for the instant conviction, petitioner has had no history of violent crime. App. pp. 61-62.

The Penalty Trial: Psychiatric Testimony

On December 19, 1975, the same three-judge panel which convicted petitioner conducted a brief hearing to determine his penalty. Because petitioner's conviction included a finding of an aggravating circumstance, the only issue before the court was whether any mitigating circumstances were present.

The State offered no witnesses at all. Defense counsel called as if on cross-examination the doctor who had given petitioner a psychiatric examination, under court

order issued pursuant to Ohio Rev. Code § 2929.03. The psychiatrist testified that he had interviewed petitioner once, on December 4, 1975. App. p. 76. There is no record that petitioner was ever given any psychological tests or that his epilepsy was ever examined by a medical doctor.

The psychiatrist diagnosed petitioner as a chronically depressed neurotic. App. p. 80. He admitted that petitioner's conduct probably was a product of petitioner's mental condition:

> "Q: [Petitioner's counsel]: Do you believe that this chronic depressive neurosis as you have diagnosed it is either the cause or one of the causes of his criminal conduct in the past ten years?
>
> "A: [Dr. Fishbain]: I would say that's likely, that there is an association. How close it is I cannot say, but it is likely that there is.
>
> "Q: It is normal or would it be within the realm of normal mental activity for someone who is chronically depressed such as Mr. Miller has been for the bulk of his life to express or to act out these depressions by criminal conduct?
>
> "A: Again I think there could be an association. I just can't say exactly what the connection is at this point.

"Q: Is it possible that there is no connection between the depressive neurosis and these criminal activities?

"A: That would be unlikely. . . ." App. pp. 81-82.

The Ohio statute uses the terms "mental deficiency" and "psychosis" to guide examination of the subject's emotional and mental condition. The psychiatrist's understanding of the statutory definition of these terms restricted his further explanation of the causal relationship between petitioner's criminal activity and his mental condition:

"Q: [Petitioner's counsel]: If someone, and again please correct me if I'm misusing this terminology or using it clumsily or out of context, but would an accessive [sic] acting out of either or these tendencies suggest mental deficiency?

"A: [Dr. Fishbain]: I think the definition of mental deficiency in the statute refers to mental retardation. Mr. Miller is not mentally retarded.

"Q: Well, this definition, of course, is the one which we must use as a guideline in a hearing of this sort at least to my understanding." App. p. 85.

The Court, however, recalled the psychiatrist:

"JUDGE COLE: Just a minute. Will you resume the stand, please Doctor? As I understand it you didn't feel that Mr. Miller was mentally deficient using the definition that Mr. Busch gave you, but you included mental retardation?

"THE WITNESS: That's right.

. . . .

"JUDGE COLE: Okay. Does he have a mental deficiency?

"THE WITNESS: Your Honor, that's not a psychiatric term.

"JUDGE COLE: Okay. Does that mean you can't answer that question?

"THE WITNESS: I cannot answer it. I've looked at the statute many times and I'm always puzzled. I can say he is not mentally retarded from my point of view and he is not mentally ill." App. p. 86.

In his summation petitioner's counsel submitted that petitioner had to be considered mentally deficient. App. pp. 89-90. In rebuttal, the State's prosecuting attorney claimed that it was inconsistent for the defendant to seek mitigation, since he had contended that he was innocent of the crime. App. pp. 90-91. Further, the prosecutor asserted that "what the statute [concerning the mitigating

factor of] mental condition had in mind . . . is where that the mind is of such a state that the person is an almost idiot or imbecile person whose mental capacity itself doesn't really comprehend what they were doing in such a situation." App. p. 91.

That same day the three-judge panel issued a conclusory ruling that no mitigating circumstances had been proved. App. p. 96. No findings of fact were noted to support this conclusion. Petitioner was thus sentenced to death.

Ohio Supreme Court Review

On review, in a majority opinion joined in by five justices, the Ohio Supreme Court noted that the test was whether the circumstantial evidence was "sufficient to justify the trier of fact to conclude not only that the accused was at the scene of the crime when it was committed, but also that the accused was the criminal agent." App. p. 110. The Court held this test was met. Two justices dissented, noting that "circumstantial evidence in general is sufficient only if that evidence excludes every other reasonable hypothesis consistent with innocence." App. p. 113. Stating that the presence of petitioner's three fingerprints could be innocently explained, the dissent concluded that the majority had imposed "the death penalty

on evidence insufficient to sustain a conviction." App. p. 113.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner's first question involving the Due Process requirement that guilt be proved beyond a reasonable doubt results from his contention at trial and on review below that the evidence was insufficient to sustain a conviction and sentence of death. This claim was rejected by the Ohio Supreme Court on the merits. App. pp. 107-110.

Petitioner's remaining questions arise from his contention in the Ohio Supreme Court that the Ohio death penalty statute violates the Eighth and Fourteenth Amendments to the Constitution of the United States. This contention was considered on the merits and was rejected by the Ohio Supreme Court in reliance upon that court's previous decision in State v. Bayless, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976). App. pp. 110-111.

REASONS FOR GRANTING THE WRIT

I

PETITIONER'S CONSTITUTIONAL RIGHT THAT GUILT BE PROVED BEYOND A REASONABLE DOUBT WAS VIOLATED BY HIS CONVICTION ON THE BASIS OF INSUFFICIENT FINGERPRINT EVIDENCE.

This Court made clear in In Re Winship, 397 U.S. 358 (1970), that the Due Process Clause of the Fourteenth Amend-

ment requires that the prosecution bear the burden of proving guilt beyond a reasonable doubt. See also Patterson v. New York, ___ U.S. ___, 45 U.S.L.W. 4708 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). In this case the State failed to meet this burden, because it did not show that the fingerprints allegedly belonging to petitioner were made at the time and place of the crime.

On review of this case, the Ohio Supreme Court conceded that under Ohio law "before fingerprint evidence may be used to support a conviction, such circumstantial evidence must exclude every other reasonable hypothesis except that of the defendant's guilt." State v. Miller, 49 Ohio St. 2d at 201, 361 N.E.2d at 422 (1977). See also State v. Sheppard, 165 Ohio St. 293, 135 N.E. 2d 340 (1956). The court applied this corollary to the "beyond a reasonable doubt" rule to this case as follows:

> "Fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime, . . . [citations omitted] [emphasis supplied]." State v. Miller, 49 Ohio St. 2d at 202, 361 N.E.2d at 422.

Indeed, any other rule would mean that: "[a]nyone who touches anything which is found later at the scene of a crime may be convicted. . . ." Borum v. United States, 380

F.2d 595, 597 (D.C. Cir. 1967). See also United States v. Corso, 439 F.2d 956 (4th Cir. 1971); Hiet v. United States, 365 F.2d 504 (D.C. Cir. 1966).

The rule that fingerprints be tied to the crime by proof of time and place of impression may have been accepted by the Ohio Supreme Court, but it simply was not applied in this case. The State offered no evidence that petitioner was at the scene of the crime on the night of the crime or even that he left his residence that night. Nor did the State preclude the possibility that petitioner's fingerprints could have been placed on the folded paper sack during one of his shopping visits to the Twin Fair store--a policeman testified that the bag was one of a number accessible to the public. Further, the store manager conceded that such packages were handled by customers, that customers opened them, and that such packages were occasionally knocked to the floor by customers. Without contradiction, petitioner testified that he frequently shopped at the Twin Fair store. In fact, he was there only a month before the night of the crime. Finally, removing the lynchpin from the State's case, the State's expert admitted that the petitioner's fingerprints could have remained on the blade, the package and the paper sack for at least a year.

The State's attempt to tie the fingerprint evidence to the time and scene of the crime failed to eliminate a reasonable doubt. This Court may review such a denial of due process, and when this denial stems from a lack of evidence must reverse the ruling below. See Vachon v. New Hampshire, 414 U.S. 478 (1974); Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. Louisville, 362 U.S. 199 (1960). None of the three counts of petitioner's conviction can withstand this Court's scrutiny, and all must be reversed.

Furhermore, even if the State's evidence were somehow deemed sufficient to support petitioner's conviction of burglary or robbery, there is simply no evidence linking him to the slaying. The three fingerprints which constitute the entire case against petitioner were each found on items far removed from the victim. There was no evidence connecting petitioner to the immediate location of the slaying, or to the bloodstained clothes and shoes supposedly worn by the murderer. Therefore, it was a violation of the Due Process Clause for the trial court to conclude that the evidence showed beyond a reasonable doubt that petitioner "purposely" killed the maintenance man.

II

THE IMPOSITION OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED MURDER UNDER THE LAW OF THE STATE OF OHIO VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On June 27, 1977, in the case of Bell v. Ohio, No. 76-6513, 45 U.S.L.W. 3840, this Court granted a writ of certiorari to decide whether the Ohio death penalty statute is unconstitutional.

Like Bell, petitioner has been convicted of aggravated murder and sentenced under the Ohio death penalty statute. Petitioner argued in the court below that the Ohio death penalty statute violated his rights under the Eighth and Fourteenth Amendments to the Constitution. This argument is asserted also in this Court. A determination in Bell that the Ohio death penalty statute is unconstitutional will control this case and will require that petitioner's sentence be vacated.

In this case, however, petitioner submits three additional arguments which will not necessarily be treated in Bell. First, petitioner's guilt was not proved beyond a reasonable doubt. Second, the weight of evidence of guilt should have been considered by the sentencing authority in

determining petitioner's sentence. Third, the sentencing authority failed to afford constitutionally adequate consideration to petitioner's emotional and mental condition in determining petitioner's sentence. It is submitted that these arguments independently merit hearing in this Court and that, therefore, this case is an appropriate companion case to Bell.

III

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION REQUIRE THAT THE OHIO DEATH PENALTY STATUTE PERMIT THE SENTENCING AUTHORITY TO CONSIDER THE WEIGHT OF EVIDENCE IN DETERMINING THE EXISTENCE OF MITIGATING CIRCUMSTANCES.

A. The Appropriateness of Petitioner's Death Sentence Is a Matter of Total Uncertainty.

There can be no act of the criminal justice system more grievous than the execution of an innocent man. It is beyond doubt, however, that in the United States some individuals have suffered the death penalty for crimes they did not commit. As Mr. Justice Marshall has noted:

> "Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death." (Footnote omitted.) Furman v. Georgia, 408 U.S. 238, 366 (1972) (Marshall, J., concurring).

On numerous occasions, this Court has emphasized that in order to lessen the possibility of tragic error, a sentencing authority must be absolutely certain that the death penalty is appropriate in an individual case, if it is ever to be imposed. As Mr. Justice Stewart wrote for the plurality in Woodson v. North Carolina, 428 U.S. 280, 305 (1976):

> "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

And in Proffitt v. Florida, 428 U.S. 242, 249 (1976), the plurality quoted with approval the Florida Supreme Court's admonition that:

> "'[T]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So. 2d 908, 910 (1975)."

The appropriateness of the death penalty for petitioner is a matter of total uncertainty, because the correctness of the underlying conviction is inescapably dubious. (Two members of the Ohio Supreme Court would have reversed the conviction on all three counts. State v. Miller, 49 Ohio St. 2d at 205-206, 361 N.E.2d at 424 (1977).)

Examined for its sufficiency as the necessary basis for the death penalty, the evidence against petitioner is simply not sufficient to support the awesome penalty imposed on him. Petitioner's fingerprints were not found on any item near the victim, but appeared only on the hacksaw blade and package some distance away and on the paper sack discovered in a gym bag outside the building. The State failed completely to refute the reasonable explanation that the fingerprints were placed on these objects during the course of one of petitioner's shopping visits to the store. Most telling of all, petitioner's prints were not found on the murder weapons or on the bloody shirt and shoes which were discovered on an adjacent rooftop.

The evidence supporting petitioner's conviction, however, was not discussed at all during the penalty trial, save for the prosecutor's suggestion that it was "inconsistent" for petitioner to seek mitigation of a crime he claimed he did not commit.[3/] The sentencing court was confined by law to a review only of evidence relevant to the seven aggravating circumstances and the three mitigating circum-

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3/ The prosecutor's comment illustrates that the Ohio death penalty statute is unconstitutional because it encourages a defendant to give up the right to jury trial in order to avoid the death penalty. See petition for writ of certiorari in Bell v. Ohio, 76-6513, page 27, cert. granted, 45 U.S.L.W. 3840 (1977).

stances. The aggravating circumstance that made petitioner eligible for a sentence of death (i.e., that the offense was committed while the offender was committing aggravated burglary or robbery) was proved as part of his offense and therefore was not discussed at the penalty hearing. The statute's list of mitigating circumstances did not permit consideration of the weight of evidence for conviction. Consequently, the prosecution was not obligated to present any of the facts of the crime at the penalty hearing, and none of the evidence which was presented relevant to mitigating circumstances concerned the weight of the evidence of the conviction.

B. A Constitutional Death Penalty Statute Must Permit Consideration at the Penalty Stage of the Weight of Evidence Supporting the Conviction.

This Court has approved only three death penalty statutes. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas 428 U.S. 262 (1976). All three provide for particularized review of the facts of the crime by the sentencing body. In Gregg, for example, both the prosecution and the defense argued the weight of the evidence to the jury at the penalty trial:

> "No new evidence was presented at the sentencing proceeding. However, the prosecutor and the

> attorney for petitioner each made arguments to the jury on the issue of punishment. The prosecutor emphasized the strength of the case against petitioner and the fact that he had murdered in order to eliminate the witnesses to the robbery. The defense attorney emphasized the possibility that a mistake had been made and that petitioner was not guilty." Gregg v. Georgia, 428 U.S. at 216 (White, J., concurring).

Further, the Georgia statute explicitly provides for review by the appellate court of the possibility that an innocent person may be executed. As Mr. Justice White explained:

> "To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. Ga.Code Ann. § 27-2537 (1975 Supp.). The questionnaire contains, inter alia, . . . one question asking the trial judge whether the evidence forecloses 'all doubt respecting the defendant's guilt.'" Gregg v. Georgia, 428 U.S. at 211-212 (White, J., concurring)

As in Gregg, the weight of evidence against petitioner must be considered to limit the possibility of tragic error. The facts suggesting petitioner's conviction were simply not so clear and convincing that the most awesome of penalties can be reliably imposed on petitioner. See State v. Miller, 49 Ohio St. 2d at 205-206, 361 N.E.2d. at 424 (1977) (dissenting opinion). Suppose a witness comes forward to testify that a person unlike petitioner was at the Twin Fair store at the time of the murder. Suppose the Clark County police were to match the fingerprints obtained from the long-handled axe to another person and thereby

uncover an equally strong circumstantial case. Suppose another individual confesses to the crime. None of these possibilities can be reasonably foreclosed, given the evidence in this case. Yet, if petitioner's present sentence is carried out, the discovery that another person committed the crime which occurred on August 13, 1975, in the Springfield, Ohio, Twin Fair store will not spare petitioner. Such a discovery will only render petitioner's death an odious miscarriage of justice.

The validity of petitioner's conviction is marked by ineradicable doubt. Even if arguendo this doubt is deemed something less than that doubt which would require reversal of the conviction, nevertheless it is sufficient to destroy the certainty which must exist before petitioner can be lawfully executed. This doubt must not be suppressed by the sentencing court's unsupported leap from conviction to the death penalty.

The Ohio death penalty statute provides no opportunity for the sentencing court to consider the weight of evidence against petitioner in determining the existence of mitigating circumstances. The statute, therefore, is unconstitutional because it denies petitioner the individualized examination and careful scrutiny of his offense that the Eighth and Fourteenth Amendments to the Constitution demand. Woodson v. North Carolina, 428 U.S. at 303 (1976); Proffit v. Florida, 428 U.S. at 251 (1976).

IV

PETITIONER'S SENTENCE OF DEATH VIOLATED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION BECAUSE THE OHIO DEATH PENALTY STATUTE PRECLUDED THE SENTENCING AUTHORITY FROM CONSIDERING PETITIONER'S EMOTIONAL AND MENTAL CONDITION AS A MITIGATING FACTOR.

A. A Broad and Particularized Inquiry into a Defendant's Emotional and Mental Condition Is Mandated in a Capital Case.

The three death penalty statutes affirmed by this Court each permit particularized consideration of a broad range of possible mitigating factors. All the statutes provide for consideration of the emotional and mental condition of the defendant at the time of the crime. The Ohio statute is unconstitutional because, on its face and as applied to petitioner, it precludes adequate consideration of petitioner's emotional and mental condition.

In Georgia, the sentencing jury may consider any mitigating factor. Ga. Code Ann. § 27-2534.1(b) (Supp. 1975) As Mr. Justice Stewart has described the operation of the statute:

> "[T]he jury's attention is focused on the characteristics of the person who committed the crime: . . . Are there any special facts about this defendant that mitigate against imposing capital punishment

(e.g., . . . his emotional state at the time of the crime)." (Footnote omitted.) Gregg v. Georgia, 428 U.S. at 197.

In Texas, a defendant may "bring to the jury's attention whatever mitigating circumstances he may be able to show." Jurek v. Texas, 428 U.S. at 272. The Texas Court of Criminal Appeals has held that such circumstances include:

> "whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand." Jurek v. State, 522 S.W.2d 934, 939-40 (1975).

In Florida, two of the mitigating circumstances specifically enumerated by the death penalty statute are:

> "(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> . . . .
>
> "(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Flor. Stat. Ann. § 921.141(6) (Supp. 1976-1977) See Proffitt v. Florida, 428 U.S. at 249, n.6.

The Ohio death penalty statute not only fails to require broad consideration of mitigating factors of a defendant's emotional and mental condition, it bars such consideration. The Ohio Supreme Court has noted that the Florida statute upheld in Proffitt "permits consideration . . . of more broadly defined mental and emotional disturbances and impairments than does the Ohio statute." State

v. Bayless, 48 Ohio St. 2d at 73, 357 N.E.2d at 1046, n.2. Nonetheless, the court upheld the Ohio statute. The court thereby misjudged the import of the difference between the Florida statute and the Ohio statute. The difference is that between constitutionality and unconstitutionality.[4/]

B. The Ohio Statute's Third Mitigating Factor Precludes a Constitutionally Adequate Inquiry into a Defendant's Emotional and Mental Condition.

The Ohio statute restricts all examination of mitigating circumstances to an inquiry into only three factors. Two concern the nature of the crime itself and are irrelevant in this case. The third and final mitigating factor is the only one which concerns the individual character of the defendant. Unlike the three statutes upheld by this Court, the Ohio statute asks only if:

> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Ohio Rev. Code § 2929.04(B)(3).

4/ The Florida statute was modeled after the Model Penal Code, Proffitt, 428 U.S. at 248 but the Ohio legislature rejected this model, apparently believing that Furman required the removal of as much sentencing discretion as possible from the judge and jury. See Lehman & Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV.ST.L.REV. 8, 20 (1974). The statute attacked herein had its basis in this misconception.

Ohio's third mitigating factor is constitutionally inadequate, first, because it requires the defendant to prove by a preponderance of the evidence that any single mitigating factor exists. Ohio Rev. Code § 2929.04(B). If the defendant fails to show, for example, that the "offense was primarily the product of" a defendant's mental condition, then the statute does not permit any consideration of such mental condition. No other death penalty statute upheld by this Court so restricts consideration of mitigating circumstances. Because proof of any degree of emotional or mental condition properly may contribute to the mitigation decision, Ohio's third mitigating factor is unconstitutionally narrow.

Ohio's third mitigating factor is inadequate, second, because it limits inquiry into a defendant's mental and emotional condition to a search for "psychosis" or "mental deficiency." The Ohio courts have sealed the statute's unconstitutionality by adopting severely restrictive definitions of both terms. The Ohio Supreme Court held in State v. Bayless, 48 Ohio St. 2d at 96, 357 N.E.2d at 1050-51 that "mental deficiency" is "a low or defective state of intelligence. . . . But it does not include the emotional and behavioral abnormalities claimed to exist by the defense."

Similarly, in this case the psychiatrist who examined petitioner assumed that "the definition of mental deficiency in the statute refers to mental retardation." The court in this case accepted this definition, and thereby refused to consider as possible mitigating circumstances (1) petitioner's epilepsy; (2) his severe memory difficulties; (3) his extremely poor educational background.

The statute's use of the term "psychosis" confirms the unconstitutionally restrictive scope of the Ohio mitigation scheme. The "psychosis" relevant under the statute must be a psychosis "insufficient to establish the defense of insanity". The Ohio courts, however, appear invariably to equate "psychosis" with the degree of insanity which establishes the defense of insanity. See Fortune v. Reshetylo, 33 Ohio St. 2d 22, 294 N.E.2d 880 (1974); State v. Jackson, 32 Ohio St. 2d 203, 291 N.E.2d 432 (1972); State v. Henley, 15 Ohio St. 2d 86, 238 N.E.2d 773 (1968). The equation of psychosis with the insanity defense also has been tacitly accepted on numerous occasions by this Court. See Lynch v. Overholser, 369 U.S. 705 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953). In directing inquiry into forms of psychosis which do not constitute legal insanity, the Ohio death penalty points to a null set: there are no non-insane psychotics.

Furthermore, the effect of the statute's use of the term "psychosis" in this case was to negate consideration at the penalty stage of the entire psychiatric testimony concerning petitioner, simply because the psychiatrist diagnosed petitioner as a chronically depressed "neurotic." The Ohio statute's reliance on the distinction between "psychosis" and "neurosis" is misplaced. According to psychologists, the distinction may be nonexistent.[5/] In any event, it may be impossible to make the distinction with reliability,[6/] and the distinction may be irrelevant to an accurate description of a person's mental condition.[7/]

5/ See, e.g., the discussion in A. Beck, Depression: Causes and Treatment 77 (1967) ("In fact, a large number of writers on depression seem to accept the gradualist or unitory concept, viz., that the difference between neurotic and psychotic depression is one of degree, and that there is no more justification in constructing separate categories than there is for dividing scarlet fever into two groups such as mild and severe.")

6/ See P. Hoch, Differential Diagnosis in Clinical Psychiatry 579 (1972).

7/ The terms "psychotic" and "neurotic" fail to describe possibly determinative aspects of a defendant's emotional and mental condition. An example of the unconsitutionally restrictive effect of the Ohio statute's use of the term "psychosis" is State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67, 73 (1976). In that case, a psychiatrist characterized the defendant as a sociopath, but the court, noting that this diagnosis was listed under a category of "Non-Psychotic Mental Disorders" in the American Psychiatric Association's Diagnostic and Statistical Codes for APA-ICDA Mental Disorder (2d ed. 1971), apparently disregarded the psychiatrist's testimony, including further statements concerning the defendant's relative inability to control his actions. 359 N.E.2d at 73. See Hoch, supra note 6, at 760, 764.

Even if the pschosis-neurosis distinction were meaningful, its use still narrows unconstitutionally the statute's scope of consideration of mitigating circumstances. In this case, the court, the psychiatrist, and the parties were obliged by their understanding of the statute to ignore (1) the parameters of petitioner's mental condition, despite his severe impairments, (2) petitioner's record as a previous recipient of mental care, and (3) his suicide attempt. The statute thus failed, like the statute in Woodson v. North Carolina, 428 U.S. 280, 303 (1976), "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." See also Harry Roberts v. Louisiana, ___ U.S. ___, 97 S.Ct. 1993 (1977). The Ohio statute is unconstitutional, therefore, because it:

> "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson, 428 U.S. at 304.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Ohio Supreme Court.

Respectfully submitted,

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August 5, 1977

Los Angeles, California

By Max L. Gillam
Max L. Gillam
Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-

GEORGE WASHINGTON MILLER,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

LATHAM & WATKINS
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ATTORNEYS FOR PETITIONER

August 5, 1977

WILLIAM NORTON

Being previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SMITH

Q State your name please?

A William Norton.

Q Your occupation?

A Patrolman of the Springfield Police Division.

Q How long have you been in this capacity?

A Under six years.

Q Were you employed in this capacity August 13 at about 2:40 A.M.?

A Yes, I was.

Q In what division were you working?

A The uniform patrol. With Officer Dennis Perry.

Q At 2:41 you received a call?

A Yes sir.

Q Where were you located?

A Approximately in the area of Bushnell Square Springfield.

Q The City?

A Yes sir.

Q Clark County?

A Yes sir.

Q As a result of this call what did you do?

A I received a call of a burglar alarm at the Twin

Fair store at Burnett Road and -- south -- and we proceeded there.

Q Were any other cars dispatched that you know personally of?

A Another cruiser was dispatched and we were assigned to back them up.

Q Who were they?

A Officer Mowrey and Long.

Q Who were you with?

A Officer Dennis Perry.

Q You left Bushnell Square?

A Yes.

Q How did you proceed?

A Down High Street to Burnett Road south on Burnett Road to Lexington, left on Lexington and got to Burnett Plaza and went across the driveway to the back of the store.

Q To the north of the store?

A Yes the driveway is on the north side.

Q What did you do then?

A Proceeded to the back of the store and pulled up there. As we pulled up we noticed some gym bags setting on the ground. We pulled up half way between the gym bags and the rear door.

Q How many gym bags?

A Four.

Q You called them gym bags. Why do you say that? Describe them to the Court?

A Some of the canvas like bags. Similar to those used for athletics.

Q Where did you find the bags?

A In a group directly in the driveway itself. Approximately right to the rear of the fabric shop right next door to the north side.

Q This area behind the Twin Fair well lighted?

A No, not at that point. A little on down close to the Fulmer store there is a door light.

Q When you turned the corner did you have your headlights on or off?

A I had them turned on and when I got to the rear I turned them off.

Q When you turned them off did you see anybody?

A No.

Q Did you approach the Twin Fair?

A Yes. My partner went toward the rear door and I went over to look at the gym bags.

Q Did you secure the gym bags?

A Yes.

Q Then what did you do?

A I went back to the cruiser to notify police headquarters and it looked like each had come from the store and

proceeded up toward the rear door.

Q What did you -- was the door open or closed?

A It was partially open when I got there.

Q How many feet from the bottom was the lower rim of the door?

A It was less than a foot.

Q Then what did you do?

A Then we returned to the cruiser again and notified the police headquarters we had observed a door open and we were going inside.

Q Where was your partner? Do you know?

A He remained at the door.

Q Do you recall when you went in whether or not there was a wire stretched across the opening to the door?

A Yes, there was a thin wire.

Q Still stretched tautly across the opening?

A I'm not sure. I believe I personally stumbled over it.

Q Did you go inside?

A Yes.

(WHEREUPON State's Exhibit A was marked for identification.)

BY MR. SMITH

Q Officer Norton, I'll show you what has been marked for purposes of identification, States Exhibit A. What is

Q Did you of your own knowledge know who finally secured those gym bags?

A I do not know. One of the lab officers.

Q You testified you went inside?

A Yes sir.

Q When you got inside was there anybody else in there?

A We didn't see anything at the particular time we went in.

Q Did you see your partner?

A Yes.

Q Did you see any other police officers inside when you went in?

A No.

Q Once inside did you find anything unusual?

A Yes. After we proceeded through the stock rooms of the main part of the store I discovered a body.

Q Now, I'll direct your attention to what we will have marked as State's Exhibit B.

(WHEREUPON State's Exhibit B marked for identification purposes.)

BY MR. SMITH

Q I'll ask you for the record what is State's Exhibit B?

A It appears to be a diagram of the Twin Fair's store.

Q Are you familiar with the inside of the Twin Fair store?

A Some were mashed down, but nothing we could see.

Q Did you find any pistol or anything associated with the shooting of Mr. Craycraft?

A No.

Q When did Sergeant Beedy, Smith and Fair get into the scene?

A Fair and Beedy arrived at approximately 3:10.

Q When they got had the scene been secured?

A The scene was secured and they were allowed entrance when the officer at the door asked me to let them in?

Q The body had not been disturbed or any other items in the store disturbed?

A Nothing in the store had been disturbed.

Q How long were you there?

A Until approximately 5:00 A.M.

Q You were the ranking officer?

A Up until Officer Birch arrived. I felt it was still my responsibility at the scene.

Q Did you assist in the evidence gathering of Officer Beedy and Smith?

A No sir. I didn't assist in the evidence gathering. They were trained.

Q What were your obligations from 3:15 until 5:00?

A I still secured the building. Captain Birch, although out ranking me, he was more interested in talking to

A No.

Q No breaking doors or jimmied marks or pried marks?

A No.

Q Did you have cause to investigate the roof of another building?

A Yes.

Q When was this done?

A In the morning. Daylight.

Q Did you participate in this search?

A I started Officer Cline on the --

MR. BUSH: (Interposing) May we approach the bench please?

THE COURT: Yes.

(WHEREUPON counsel conferred at the bench out of the hearing of the reporter)

BY MR. SMITH

Q I'll show you what is marked for the purposes of identifications Exhibit H.

A A pair of shoes and a shirt.

Q Do they look familiar to you?

A Yes, they do.

Q The exhibit is a photograph is it not?

A Yes.

Q Did you see a pair of shoes and a shirt the morning of the 13th?

A Yes I did.

Q Where were they located?

A On top of the fabric shop on the rear of the building.

Q Anything unique about the shoes?

A A red substance on them.

Q Did you examine the shirt?

A I did.

Q Did you check the shirt?

A A print. It appeared to me to be brown and cream colored and it had red stains on it.

Q From what angle was that photograph taken?

A It was taken from the west of the building. Heading east. It faces east.

Q Taken from the top of the roof?

A Yes.

Q There is a box depicted in that photograph?

A Yes.

Q What does that depict?

A It was placed there to protect the area where the gym bags were and show the area where the gym bags were at.

Q Were you there when the photographs were taken?

A Yes.

Q Somebody climed up to take the pictures?

A Yes.

Q Do you know who climbed up to bring the shoes down?

protruding through the skull.

Q Did you notice any other tramatic marks about the skull?

A Only what was there.

Q After this observation?

A What did I do after this?

Q Yes?

A We started a normal check of evidence at this time. The coroner was called at that time.

Q What was the first piece of evidence you thought significant?

A From the whole scene or this check point?

Q From the scene around the body?

A A search I would say the hatchet we found.

Q If you saw it again could you identify it?

A Yes.

Q Where did you find the hatchet?

A Yes sir.

Q The point?

A The first display rack and at the very end opposite the end of the body.

Q Here? (indicating)

A Yes sir.

Q Did this have any sort of covering on it?

A No sir.

Q What was it laying on?

A A canvas bag.

Q I'll show you what has been marked for the purposes of identification Exhibit I?

A Yes sir.

Q What is it?

A A small hatchet and canvas bag I collected.

Q That is the hatchet and bag you collected?

A Yes sir.

Q How far is that from the feet of Mr. Craycraft?

A I would say about eight feet.

Q Did yo notice anything unusual about this particular hatchet?

A It was covered with blood and covered with hair.

Q Directing your attention to the area where the overhead door is -- did you have cause to examine that area?

A Yes sir I did.

Q What did you think significant in the area of the overhead door?

A In the area of the overhead door was a saw, the casing the saw was in, saw blades and on the right hand side as you're facing the door looking outward and along on the length side one lock on the right hand side appeared to be forced along the right hand side.

Q I'll show you what is marked for purposes of

identification State's Exhibit M. Do you recognize that?

A Yes sir.

Q What is it?

A This is the lock from the right hand side of the door.

Q How do you know?

A This is the largest and I identified them as large and small locks.

Q Where did you find this in relationship to the door?

A Laying on top of a carton box to the right of the door.

Q Right here? (Indicating)

A Yes sir.

Q That is the larger of the two locks?

A Yes.

Q I'll show you State's Exhibit L. Do you recognize that?

A This is the smaller of the locks on the left hand side laying on top of some plastic cartons there.

Q Anything significant there?

A Bent and signs of being forced.

Q I'll show you what has been marked as State's Exhibit K. Do you recognize that please?

A This isthe package laying on the box here just to the right of the door and looked like two of the saw blades.

Q State's Exhibit N?

A Yes sir they were.

Q Did you find in your examination of the area surrounding any of the doors -- did you find any attempt to enter the building from the outside?

A No sir I didn't.

Q Did you take fingerprint dustings from any where else in the building?

A That is the one I took.

Q Did you take fingerprint dustings anywhere else in the area other than you described?

A That is the only one I took.

Q Did you -- ever have it brought to your attention -- was there any kind of long handled ax there in that area?

A Yes sir Officer Smith brought it to my attention.

Q Just answer yes or no?

A Yes there was.

Q Did you see the ax in some location?

A Yes sir it was laying on the counter from which the other axes came.

Q Did you also dust it for prints?

A No sir I did not.

Q No part? Not the blade or the handle?

A No sir, I didn't.

Q These exhibits specifically the one you identified as coming -- or having a hacksaw -- who brought the saw to you?

CHARLES CRAYCRAFT

Being duly sworn, by Court, testified as follows:

DIRECT EXAMINATION

BY MR. SMITH

Q State your name please?

A Charles Craycraft.

Q Charles keep your voice up please. How old are you?

A 24.

Q Were you related to Shirley Craycraft?

A Son.

Q How many children did your father have?

A Eleven.

Q Is your Mother still living?

A Yes.

Q Did your father own a gun?

A Yes.

Q What kind?

A A 22 revolver.

Q How did you become conscious of the gun your father had?

A I gave it to my dad.

Q How is that?

A I bought it from a guy and my dad wanted it and I bought it and gave it to him.

Q When did he carry the revolver?

A He carried it every night he worked.

Q How do you know?

A I worked with my Dad and he never went in the store at night when he didn't carry the gun.

Q Where did he carry it?

A The front right pocket or right back pocket.

Q You worked with your Father at the Twin Fair?

A On several occasions.

Q You mentioned a revolver. Caliber?

A 22.

Q Describe the gun?

A A little black gun seven inches long -- six inches. White pearl handle with Rome on the handle.

Q How do you spell that?

A R-O-M-E.

Q How many rounds would the cyclinder hold?

A Six shot.

Q When do you recall your Dad purchasing -- you purchased the gun, you tell me.

A I got it off of a friend.

Q How long ago?

A Nine years ago.

Q Was it your Dad's practice to carry the gun?

A Yes.

Q During this nine year period.?

swab over the paper product. After the paper product is coated we then place the paper product in a steam cabinet. We have warm water to produce a high concentration of humidity and is left there for a period of twelve to twenty-four hours.

Q What does this process produce?

A This process reacts with the amino acid which are present in perspiration -- human perspiration. This produces a blue discoloration with the presence of the complexity of mixtures of the amino acids.

Q What is it used specifically for?

A Developing of latent prints on paper.

(WHEREUPON State's Exhibit LL marked for identification)

BY MR. SMITH

Q Mr. Brown, I'll show you what has been marked for the purposes of identification State's Exhibit LL. Do you recognize that?

A Yes, I do.

Q When is the first time you saw that?

A The first time I observed that was after the original inventory at which time I was going through various articles.

Q For the record, what is LL?

A A brown paper sack,

Q Do you know where this paper sack came from?

A I know where I retrived it from. From one of the blue duffle bags -- bag 3.

A To the blade and the handle of the saw.

Q Was anybody working with you at the time you were doing the dusting?

A Yes, Deputy Clevel was in the laboratory.

Q What time was this done?

A I could only estimate the time.

Q Between what time?

A Between seven and nine P.M. It would be on the 13th. The first day after.

Q After you dusted the blade what did you find in particular significant?

A I found latent fingerprints,

Q What did you do then?

A At that time I did locate latent prints and additional print combinations on the handle and blade on the saw.

Q Of the two which was the better print?

A By far the latent print located on the side of the saw blade.

Q Hold it up and indicate where it was located?

A The print was located on this side of the blade. (Indicating)

Q I noticed there are smudge marks or darkening there does that blade have a trade name?

A Yes.

Q What does it say?

Q What is it?

A The latent print I lifted from the hacksaw.

Q This is a piece of glass?

A Yes.

Q And you recognize that as such?

A Yes sir.

Q What if anything did you do with the latent print after you lifted it?

A After it was lifted Deputy Clevell and I placed the print in a photographic span area. One of these photographs enlarger units and we did take a photographic shot of that enlarged print through the enlarger for the purposes of obtaining a photograph for which we could refer to check our latent print. So, we would have a large copy of the print to file check.

Q Did you attempt to lift any of the other smudge prints over the blade and handle?

A No, I did not.

Q Could there have been prints off the handle?

A Conceivably. My interest was in processing the other latents.

Q Did you perform any blood tests?

A Yes, I did.

Q During the course of your education have you had courses in the education of hemotology and the properties?

method of identification.

Q How does it work and what does it mean?

A It works by the fact we take a portion of the blood stain and subject it to the anti-A and anti-B to affirm general blood typing.

Q What is an anti-A and Anti-B determination?

A The normal anti-bodies are actually present in different blood types. These are for the purpose of typing blood under the A B O system.

Q Was this used in testing the number 3?

A Yes.

Q Did you do that test?

A Yes, I did.

Q What were your conclusions as a result of this?

A My conclusions are it was classified as type O blood.

Q So the blood on the shoe is type O. Is that correct?

A That's correct.

Q I'll show you what has been marked for purposes of identification State's Exhibit P: do you recognize that?

A Yes, I do.

Q What is that?

A That is a shirt submitted along with the other evidence.

Q What, if anything, or what test did you perform on that shirt?

A I did the same test as I do on the shoes. The test for blood, human or anti-human.

Q Did you cut swatches from that shirt?

A Yes, I did.

Q Where were the swatches taken?

A Here is one; here is anohher one.

Q How many swatches did you take?

A I cut two normal type sections and subdivided those.

Q Did you submit those swatches to the same test you testified to on the shoes?

A That's correct. Yes.

Q What conclusions?

A I came to the condlusion it is human type O blood.

Q Do you know the blood type of the decedent Shirley Craycraft?

A No, I do not.

Q I'll show you what has been marked for purposes of identification State's Exhibit I; do you recognize that, please?

A Yes.

Q What is that?

A These are two articles: a hatchet and some kind of canvas bag which were both subjected to the blood tests.

Q Both human?

A Yes.

Q Where did you get this particular exhibit?

A It was wrapped as it is now and was in a large cardboard located in the evidence room.

Q What testing did you subject it to?

A I subjected the hatchet to the same tests as the other articles. That is the A, B, O blood typing. Human and anti. And did a blood crust alone.

Q Did you reach a conclusion as a result of your investigation?

A Yes, I did.

Q What was the conclusion?

A It was my conclusion the blood on both articles are the same as human type O.

Q Did you cause these to be done on any other hatchet?

A Yes, one.

Q What was that?

A A hatchet.

Q Could you identify that if you saw it?

(WHEREUPON Exhibit NN was marked for identification)

BY MR. SMITH

Q I'll show you what has been marked for purposes of identification State's Exhibit NN: do you recognize that please?

A Yes, I do.

Q What is it?

A It's the second hatchet I examined for blood?

Q What test did you do for that?

A I used the crust flack, the A, B O testing. The two blood tests and human anti-human.

Q What conclusion?

A I came to the conclusion it was human type O blood.

Q You mentioned you scraped these shoes that are exhibit O: did you have any success or was your product significant?

A In my opinion my product was not significant.

Q These exhibits to which you testified and you performed these tests: what is, if anything, did you do with them after you were through?

A With the articles I tested?

Q By you, yes?

A I put them back in the original package from which I removed them and took them to the property room and placed them back in the large box that they were located in before the testing.

MR. SMITH: I have no further questions.

MR. BUSCH: In view of the fact all of the testimony by this witness has been with relation to and in connection with exhibits that have not been admitted into evidence I would object to the competency of any of his testimony subject to the admission and the eventual admissibility into evidence is such should be the case.

THE COURT: Very well Mr. Busch, the Court will

time which they would dissipate.

Q What range of time would that range be?

A We do have ninhydrin prints filed six months to a year on paper and we have lost the ninhydrin as short as one week.

Q Would it be accurate to suggest a period of time ranging somewhere from one week to six months or one year to lapse from the time prints were -- proported prints and when they actually were made?

A Yes.

Q Your tests don't make it possible do they to determine when the prints were made?

A No, they do not.

Q The paper bag proported as Exhibits LL: how did it look when it was given to you?

A The paper bag?

Q Yes, LL. This item?

A It was folded.

Q Like this? (Indicating)

A I'm not exactly certain as to the exact fold of the paper. I unfolded it at the time it was removed. Out of the blue duffle bag.

Q What was in it? Did you see what was in it when it was removed from the blue duffle bag?

A I did not note anything in it at the time it was

A That's correct.

Q What does that in your cursory opinion appear to be?

A In my opinion that appears to be a latent finger-print.

Q What if anything did you do with that print after the examination?

A After it was made it was stacked in a stack with other papers and Officer Smith was notified if there was someone other than the I they wanted to examine it.

Q As far as you know you raised the print and he was through with it. Did you lift the print?

A No, I did not.

Q Did you photograph the print?

A No, I did not.

Q That ended your responsibility as far as LL?

A Yes.

Q Did you use this process on any other articles that came to you that day?

A Many articles.

Q I'll show you what has been marked for purposes of identification Exhibit K: do you recognize that please?

A Yes I do.

Q What is it please?

A There are several cardboard packages things along with a metal blade -- a hacksaw blade.

Q Where was this evidence deposited in the store?

A The evidence was placed on a ping pong table adjacent to the scene of the victim location.

Q Did you yourself accumulate any evidence?

A Yes sir I did.

Q What did you personally obtain?

A I obtained some sacks that were located throughout the store.

Q What kind?

A Twin Pair sacks. I accumulated them and an ax.

Q If you saw it again could you identify it?

A Yes,sir, I could.

(WHEREUPON Exhibit OO was marked for identification purposes)

BY MR. SMITH

Q I will show you what has been marked for purposes of identification State's Exhibit OO: do you recognize this?

A Yes sir I do.

Q Where did you find that?

A This ax was in the display area of the store where the axes are normally kept toward the front of the store to the west part.

Q I am directing your attention to State's Exhibit C and the area on this area B. Is this where you found the ax?

A Yes sir it is.

Q Did you have cause to investigate this area C on State's Exhibit C the two jewelry cases here?

A Yes sir, I did.

Q What did you observe?

A At that point there are three jewelry cases that were broken. The glass on the front of them had been broken with some object. There was places upon the shelves where objects were missing.

Q What kind of objects?

A Jewelry.

Q What were the objects left?

A Objects that were watches, boxes. Some parts of jewelry necklaces.

Q Did you have cause to examine State's Exhibit OO in light of your investigation into the jewelry display cases?

A Yes sir, I did.

Q Did you find anything significant on this particular exhibit?

A Yes sir I did.

Q What was it?

A There was some small cuts found in the area of the handle of the glass and one small piece of glass embedded in the wood handle near the blade.

Q Dust for prints?

A Yes sir.

Q Dust successful?

A Yes sir, there was several latents obtained.

Q Were you able to identify the latent?

A No sir I did not identify the latent.

Q What else did you do while you were there other than do whatever just related to the Court?

A Check in the back area of the store behind the general merchandise display area in the lunch room and the restroom of the back part of the store.

Q Did you notice anything unusual in the lunch room?

A In the employee lounge there was on the table right in there there was a cup of coffee and a pack of cigarets. we felt had some pertinence to this case.

Q Did you go back to the restroom?

A Yes sir.

Q Did you go into both restrooms?

A Yes sir I did.

Q Anything unusual there?

A In the restroom the sink in the women's restroom had the appearance to be recently used.

Q How could you tell that?

A There was water around the laboratory.

Q Any blood?

A Yes on the sink top itself.

Q Did you examine the men's restroom?

Q And --

A At this point these footprints in all of these areas were going both directions going to and fro throughout the store.

Q Did you notice any footprints around the body in blood there?

A Yes.

Q Generally speaking describe the footprints?

A They appear to be of a tennis shoe or ribbed pattern. They were fairly a large type shoe. Approximately the size I wear. Which is 10½.

Q These prevalent around the body?

A Yes sir in a very distinctive pattern.

Q What if anything did you do with the shoes you found on top of the building?

A I did compare the footprint impression of that shoe with the shoe print at the scene.

Q How did you do this?

A Made a photograph of the shoes.

Q Where was this done?

A The photograph was done at police headquarters.

Q Before we get into that go back to the scene -- did you go with the body to Mercy Medical Center?

A Yes, I did.

Q At this time was your preliminary investigation

the scene could not be produced by inking it and using an ink impression.

Q Did you do anything else with the shoes?

A No sir.

Q Any photographs at all?

A We did photograph the shoes.

((WHEREUPON State's Exhibit VV and WW marked for identification)

BY MR. SMITH"

Q I'll show you what has been marked for purposes of identification State's Exhibit V, VV and WW and ask if you can recognize these exhibits?

A Yes, I can.

Q What is VV?

A A photograph of the left shoe from the roof of South Burnett Road indicating the wear pattern of it and one of the footprints at the scene at 533 South Burnett Road. Specifically oil in the automotive.

Q Have you compared these?

A Yes sir.

Q Would you point out the points of comparison and the photograph and the lifting of the print inside the store?

A The compare pattern in the sole area of the shoe and the heel pattern of the shoe and compare and are similar. In my opinion this shoe did cause this shoe print.

Exhibit F and State's Exhibit LL: did you recognize both of these exhibits please?

A State's Exhibit F is one of the gym bags from the scene.

Q What did that contain?

A Clothing was stuck in sacks in the inside.

Q State's Exhibit LL: do you recognize that?

A That is the sack in one of the gym bags,

Q I noticed there are other clothes and items of apparel?

A Yes.

Q All inventoried?

A Yes.

Q And examined for prints?

A Yes sir.

Q All the items in State's Exhibit F and including State's Exhibit L: what of significance did you find?

A I found a fingerprint on State's Exhibit LL that was the right ring finger of George Washington Miller.

Q Who raised this fingerprint for you?

A This fingerprint was raised by an ninhydrin process by John Brown.

Q And forwarded to you for your expertise?

A Yes sir.

Q What if anything did you do with LL?

A I compared the fingerprint.

Q How did you compare?

A With a small fingerprint magnification.

Q This the first fingerprint you raised on this item?

A No sir, it was not.

Q Which one was the first print?

A The first comparison.

Q Which print did you make the first comparison on?

A The first was on a small glass slide from a fingerprint on a saw blade.

Q If you saw the small glass slide could you identify it?

A Yes.

Q Do you know who compared this?

A Yes.

Q And gave it you for further comparison?

A Yes sir.

Q What if anything did you do with the fingerprint on the small glass slide?

A I compared the fingerprint on the small glass to the prints on file.

Q Do you recognize State's Exhibit MM?

A Yes sir I do.

Q What is that?

A That is the latent print lifted from the saw. The saw blade from the scene on South Burnett Road.

Q I'll show you State's Exhibit N and ask if you recognize that?

A Yes, that is the saw blade that the latent print was raised on.

Q What if anything, did you do with MM?

A I compared latent print to MM, with the known print on file and we found this was a left thumb print of George Washington Miller.

Q Tell the Court how you arrived that this was a left thumb print?

A From the positioning on the saw, it was apparent on the partial latent print on the opposite side of the blade. This was on the left hand. It was apparent this was the left thumb print. I went through the selection of fingerprint files in police headquarters.

Q Looking for just the left thumb?

A I determined this was the thumb print of George Washington Miller.

Q What did you do to determine that?

A As I was searching each individual card I examined left thumb prints. When I found similarities I examined it more closely. When I compared it with George Washington Millers it was the exact one I was looking for at this time. I took it out and examined it closely.

Q How did you examine it?

A With the fingerprint magnifier.

Q If you saw your worked product could you identify it?

A Yes sir.

Q I'll show you what has been marked for identification State's Exhibit YY?

A Yes this is the latent print from the glass slide from the saw blade removed from the scene and this is the left fingerprint of George Washington Miller by myself the 15th of August.

Q Did you have one of Miller's fingerprints on file?

A Yes sir that's correct.

Q He was brought to headquarters?

A Yes.

Q What did you do when he came to headquarters?

A I photographed him and fingerprinted him. At that point I removed his shoes.

Q What did he have on?

A Brown suede type shoes.

Q I'll show you what has been marked for purposes of identification State's Exhibit ZZ. Do you recognize those?

A These are the shoes removed by me on the 15th.

Q Do you see George Washington Miller in the courtroom?

A Yes sir.

Q Would you point him out?

A The Defendant sitting at the table.

Q Let the record reflect he is pointing to the Defendant George Washington Miller. What size are these shoes?

A These shoes are 9½.

Q You say you fingerprinted him once you got him to headquarters?

A Yes sir, I did.

Q You have them on file in anyway?

A Yes.

Q Did you compare the ones you lifted on the saw blade to the old print?

A Yes sir.

Q Did you recognize whether or not the print on the saw blade was George Washington Miller's?

A Yes sir.

Q What is your opinion?

A My opinion is the print is the same as George Washington Millers/

Q Explain your reason by using the list of comparison?

A I outlined the 15 points of comparison indicated on the latent print on the saw blade as outlined on the bottom of the comparison on the other. One of the points in one is bifurcation ; two, is the ridge endings; point 3 is the juncture of two bifrications; point 4, bifrications; 5 with a bifrication with a short ridge ending; point 6 is an island; point 7 is a bifrication; point 8 is a small island; point 9

put his hand on it?

A It's my opinion George Washington Miller did handle that sack.

Q Were you able to lift one other print?

A One other one I identified as that of George Washington Miller.

Q I'll show you Exhibit K and ask if you recognize Exhibit K?

A Yes sir, I do.

Q What is it?

A The backing of the saw package -- saw blade package and the front package in the saw blades.

Q Would you examine the covering? How does that fit in there?

A Normally in this manner. (Indicating) The plastic cover completely covers the plastic bag.

Q I'll hold it and I want you to tell the Court where you got the fingerprints?

A The latent print right in there. (Indicating)

Q Where is it?

A Very faint, right there.

Q What if anything did you do in light of this actual print?

A I made a thumb print.

Q Did you examine and study it?

A Yes.

Q Do you have that with you?

A Yes, I do.

Q Based upon your study and comparison, do you have an opinion whether George Washington Miller put his hand on this?

A In my opinion this is the thumb print of George Washington Miller.

Q Did you see it there?

A Yes sir.

Q Where was it located?

A The back dock area where the overhead door goes out.

(WHEREUPON State's Exhibit AAA was marked for identification)

BY MR. SMITH

Q Do you recognize State's Exhibit AAA?

A Yes sir, this is a photograph of the latent developed from the back of the saw blade.

S2 Q Exhibit K?

A Yes.

Q I noticed on these two exhibits, XX and YY, there are twelve points of comparison on one and 15 on the other. Are there more than that?

A Yes sir there are.

Q Why did you stop there?

Q CM is centimeters?

A Yes.

Q What in inches?

A Eleven centimeters is equivalent to three inch and a quarter. So the other one would be similar to that.

Q If you will hold up the print?

A You can see the lacerations are grouped and fall in five directions. One of them is from the left to the right, to the right to the left and one oblique. The point where these lacerations join together there was a massive brain tissue protuding from the hole. I examined the scalp and it was swollen. I could feel the bones were broken. Upon examination I confirmed this.

Q Could you interrupt for the Court please what would have produced, as a forensic pathologist, what it would have produced this? What could have done this?

A When I examined the wound I thought it represented an incisional wound. By closer examination of the margin it was not. It had to be inflicted by an instrument not ~~short~~ Sharp but blunt. Simply blunt.

Q Could the ax in Exhibit I cause those wounds to which you testify, Doctor?

A Yes, it could.

Q These wounds seem to have come or were inflicted from different axes here. Is that true?

the line of the hair on the left side on it. There was an additional laceration on the right side. All of these lacerations were confined to this particular area which measured altogether in an area 12 cm by 10 cm.

Q Do I interpret your drawing that your saying the incision was this way and this way and these would be parallel and it came in this way and one directly in this way. (Indicating)

A Yes.

Q These diagrams, are they accurate?

A What do you mean accurate?

Q Are they accurate?

A Close enough to what I saw in the body.

Q You do recognize the diagrams?

A Yes. These wounds. We took photographs of these wounds so we could compare with the drawings.

Q Did you notice any areas of trauma that looked as if they were bullet holes?

A We found five entrances of bullet wounds: three in the head; two in the neck.

Q Do those represent where you are pointing?

A These are the wounds.

Q What side?

A The right side. All of the bullet wounds were in this area. The one was 7 cm above. The third one was behind that one in this area. All of these had a circular appearance

in this area and left areas it didn't touch. Free of.

Q Would you say these parallel markings are about the size of the sole of a shoe?

A That is the impression I have.

Q Doctor, in your opinion could those shoes have produced the wound on the left upper arm, or the right. A shoe?

A I cannot be sure because here the groups are very close and I remember when I did the autopsy the closeness of this was on .5 is a little bit wider than this. (Indicating) As I said before, I have to know how his body was clothed. When I examined the body he was unclad.

Q Doctor, did you have an opinion based upon a reasonable degree of medical certainty as to the death of Shirley Craycraft?

A Yes sir.

Q What is that opinion?

A He died as a result of cerebral cranial injuries and gunshot wounds involving the head and neck.

Q I'm showing you Doctor an exhibit marked State's Exhibit KK-4. Do you recognize that? What is that please?

A This is a photograph of the skull after removing the scalp. You can see two entrances there. The entrance wounds. It shows the hole in the temporal area.

Q State's Exhibit 13. What does that represent?

Q Did you find these vital signs in connection with the blunt instrument wounds?

A Yes, both.

Q Did you find sufficient signs from the other injuries to indicate what if any period of time lapsed from the sequence, or whether they appeared simultaneously?

A That is a very difficult question. I cannot say about the time. One thing I can say each of the lacerations were not inflicted at one time. They were inflicted at separate times. You understand, not at one time, but several blows.

Q From several different directions?

A Several different directions from several different hours -- I don't mean hours. But the same with the bullet wounds. If you read books you will find that a vital reaction is found in those cases in which the individual got the injury while he was alive in a period that varies from 20 to 30 minutes.

Q This could have been that wide?

A Sometimes if you have some kind of period of time and you inflict during their period it would be difficult to establish wounds knowing when the injury was inflicted before death or just after death. Before death, just before death or after.

Q Would the varieties of injuries and the different

the wound was wet as though someone might have washed his hands with it on?

A It wasn't wet.

Q It was not wet?

A No not wet but dirty. Dust.

Q Dusty?

A Dusty and dirty.

Q Did you find any other wounds on Mr. Craycraft that suggested that it preceded this attack such as this one on his right thumb?

A Not other than that.

Q Do the wounds and the description of them suggest he might have been attacked from different directions at the same time?

A That's a reasonably possibility. Yes, it's possible.

Q Did you indicate I believe on the basis your examination of the post mortem the following morning, all the details concerning his physical condition death and weight? That the death could have been anywhere from 8 to 10 hours prior to 8:45 on Wednesday morning?

A That's one consideration also a rigor mortis. I don't know anything about the investigation. What he found. What time it was. Just going on my examination of the body. On rigor mortis. Had to be between eight hours. This is not exactly. That is not a rule that applies to every individual.

and a lot of -- I assume you found a lot of prints?

A Yes sir, that is correct.

Q Did you correlate any prints or photograph and catalogue them?

A Yes we did.

Q How many latent prints were you able to find you lifted and catalogued?

A The total prints there was probably from all the items that had been collected probably close to a hundred individually.

Q Was anyone of these prints individually checked against your existing files?

A Yes sir.

Q Were you able to find any matches of any of them?

A I matched some of those with George Washington Miller. Other than that I found one latent belonging to myself.

Q Do you know how many employees work in the store?

A No sir I do not.

Q Did you investigate how many there were?

A No sir I did not.

Q Or how many there was on duty that night?

A There was a list given to the detective in this case. As to whom they were --

Q Did you take their prints?

A No sir.

Q Did you take Mr. Craycraft's prints?

A I did not.

Q Do you know whether prints were taken of Mr. Craycraft's fingers?

A Yes they were.

Q Did you examine them with the prints you discovered in these areas?

A No sir I did not.

Q Did you alone remove the contents from the gym bags we have been discussing?

A No sir I did not remove the contents of the gym bags.

Q Did you see who did?

A Yes I did.

Q Who was that?

A Officer Fair and Officer Beedy.

Q Did you indicate you had inventoried and catalogued the items removed from the bags?

A They were catalogued by Officer Fair and Officer Beedy as they were removed.

Q Was there a variety of jewelry and watches found in the bags?

A Yes sir clothing and shoes.

Q Were you able to find any recognizable latent prints?

A Recognized to me to be good latent prints. Not recognized as belongingto anybody.

Q I don't understand, you found good prints on these items but you were not able to determine whose they were?

A No other than the one print.

Q You didn't take the prints of the employees of the store?

A No sir I did not.

T11,S1 Q Do you recognize this officer? This is State's Exhibit 00?

A Yes I do.

Q Are you the one who located this?

A This was pointed out to us by an employee of the store.

Q Do you remember who pointed it out?

A Mr. Bolin one of the managers.

Q Pointed out to you or showed you where it was?

A Pointed out to us where it was.

Q Exactly where was it in relation to the jewelry?

A Area B. In what as referred to as gondolas in the display area of the aisles.

Q This is covered with what appears to be white fingerprints?

A Dust.

Q Did you examine it for prints on the surface?

A Yes.

Q Did you also find some recognizable prints on the

flute of the blade?

A Yes sir.

Q Did you check them with any prints that might have been there on the blade?

A I checked them with Mr. Miller's prints and they were negative.

Q You did verify to your satisfaction based on the damage and the glass that this was the ax used in the breaking of this?

A Yes, I believe it was.

Q Officer Smith, while you and Sergeant Beedy and Officer Fair were gathering up and collecting these items did anyone collect them as well? Did anyone carry anything over to assist you to the ping pong table?

A Not to my knowledge.

Q Did you wear any kind of protection on your hands? You said one of the prints was your own. Did you wear anything on your hands to prevent confusion on the prints?

A No sir I did not.

Q Did you say Officer Fair and Sergeant Beedy were the ones helping?

A Yes.

Q Anyone helping them at the time?

A No sir this was in the lab at police headquarters.

Q You were the one physically putting them in the bags?

A At this time I was. They were handing them to me and I was checking them for latent prints.

Q Were any of you wearing any protective covering while you were checking the paper surfaces?

A No sir we were not.

Q Were you able to determine from your own independent observation where the paper bags came from?

A Yes I was.

Q Did they have any impression on them to help them be identified?

A Yes they did.

Q What did they say?

A Twin Pair and they have other markings. I don't know the final whole titles.

Q Were you able to discover or did you investigate areas in the store where the bags were available?

A Yes we did.

Q Would it be reasonable to assume the bags were touched by human hands for display or use?

A Yes sir.

Q What kind of rack or counter or case were they in, if you remember. The ones that were not used. The ones that were there for customers?

A The only one I examined were laying throughout the store. Most of the sacks I believe because from the front part

of the store and they kept them in stacks at the checkout counters.

Q These are located outside the checkout counter?

A I believe so. Somewhere around outside.

Q Outside available for some of the customers?

A That is correct.

Q Did you happen to know whether the ninhydrin process you mentioned were applied to all the surfaces of all the paper bags you located in the gym bags?

A To the best of my knowledge it was.

Q This was not done in your presence?

A No it was not.

Q How many paper bags did you discover altogether that were in these four gym bags?

A I don't recall the exact number.

Q Do you recall the approximate number?

A Approximately 8 sacks.

Q Do you remember where the other seven bags are?

A There are some in the gym bags. We also have some sacks upstairs.

Q All of them examined for prints from anybody that may have touched them?

A Yes sir they were.

Q If they were touched by me would I leave a print if I gave a firm touch to it? Would I leave a print that might

by which the paper was manufactured?

A No sir I did not.

Q Does it make any difference in extracti a print that has to do with the absorption of the acid through the substance itself? Does it make any difference how that substance was manufactured?

A Are you referring to the ninhydrin process?

Q Yes?

A The ninhydrin process must be used to produce it.

Q Is it distorted or have any effect on the type of paper the process of the finish hues in the process of the paper?

A To my knowledge it does not.

Q You say to your knowledge that is your limited knowledge?

A All of the cardboard or the paper treated with the ninhydrin process does not make any difference. They are good latent prints. They were.

Q In the process of the people handling the bags more spacifically LL, you must have picked up other recognizable latent prints on that bag?

A That's correct.

Q Whose were they?

A I did not identify other latents on the bag

Q You mean they were identifiable but they were not identified?

A I believe there were other prints identifiable but however I did not identify them.

Q These could have been on the other paper bags in the gym. These identifiable but not identified prints. Is that right?

A That's right. They could have been on all the bags.

Q Officer Smith, did I understand you correctly to say you were the one who took the pictures on top of one of the roof's in the area?

A Yes sir. That's correct.

Q How did you get up to the roof?

A We had a ladder on the van. We removed the ladder from the top of the van and climbed up.

Q When you were up there were you able to see or did you investigate if there was any other means of access to the roof?

A I did not myself.

Q Did you have an opportunity or take an opportunity to examine the entire roof of that structure?

A I did not but it was examined.

Q Who, if you remember conducted that?

A Officer Fair and Cline.

Q From what you were able to determine on that roof when you took the pictures and looked in any direction you could, could you tell if the area was one solid plain or broken

A It does not change the characteristic pattern but can change the ridge endings in the specific area by cutting or changing their appearance.

Q It becomes a personal feature does it not?

A Yes it does.

Q How many fingerprints were you able to identify or even notice, much less than identify, on the entire surface of this package that contained the saw and the saw itself? Did you log in your department the total of the prints?

A On the package, the bag package?

Q Any part of the exterior of the package and the contents thereof?

A There was only one identifiable print on the package itself. On the cardboard package itself.

Q Evidence of other prints?

A Evidence that the other person handled these items.

Q This would have prints from any number of people?

A That's correct.

Q You already testified earlier it's impossible to determine when this print you testified to earlier or any of the prints were left on that surface. Is that correct?

A That's correct.

Q In these years you testified to -- two or two and a half?

A Three and a half in the laboratory and before that

A If the dissimilarity was there, yes it would invalidate it. Yes.

Q Do you have any matching code recognized in the City of Springfield Police Department that are accepted practice or accepted procedure for classification of fingerprints for reading fingerprinting?

A Reading identification?

Q Do you have any of these recognized?

A Are you talking about single print classification?

Q Yes?

A We could not use it as such. One is being developed by our city to use as a computer.

Q Back in August as we sit here, the city police does not have that facility?

A That's right.

Q Did you rely upon what you described as random technique identification?

A I relied on eyesight.

Q How many fingerprint cards as of August 13 of this year -- how many total fingerprint cards would you estimate were on file in the City Police Division?

A I would estimate over 50,000 on file.

Q Would it be inaccurate for me to suggest -- without a single fingerprint I.D. system -- the single system -- that you would have to in order to make a comparison go through

every one of those 50,000 prints?

A That would be correct. Yes.

Q Or at least until you reached what? Would that further be compounded by the fact in the absence of a single fingerprint system you cannot tell from which fingerprint the latent come. You would have the one you're looking for to cut down on the possibilities. If we assume you have that particular difficulty and we further assume you have ten prints in these cards what you're talking about is 50,000 combinations you have to examine?

A Yes sir,

Q How long a period of time would it take in the estimate to examine these to make a valid or legimate identification?

A I can only tell you what time it took to find one. When not knowing which one I was looking for in searching 500 cards it took me hours.

Q But you didn't run any further searching on any of the other identifiable fingerprints you found? When you're making an enlargement for the purposes of comparative analyses and which is rendered in a photograph print what kind of optical device did you use?

A An enlarger with the normal photographic lens. Enlarger.

Q A vertical bellows enlarger. Did you use the negative

Q What was your conclusion?

A It was my conclusion the human blood cells used in this testing of blood cells used here would only glutinate when reacted in the high content indicated with series and low concentration they failed to glutinate properly.

Q Is it fair to say that as a result of the re-agent you concluded it was type O?

A The original conclusion was O.

Q This is not now accurate?

A That's correct.

Q What other tests did you do over the weekend to determine the blood type and grouping of Shirley Craycraft?

A The clothing was taken to Mercy Hospital Serology Department and we tested it with the antibodies and human blood serum to test the dry blood. These antibodies and human serum used to test from Friday night until 6:00 Friday and again Saturday morning at 9:00 A.M. until noon.

Q Did you participate in the analyses? What was your source for blood comparison in light of the exhibits here?

A My source?

Q Where did you go?

A I removed a portion of --

Q (Interposing) State's Exhibit DDD.

A That's correct.

Q You removed a portion of clot material from this

was what type did Shirley Craycraft have?

BY MR. BERRY

Q What did your results indicate?

A My results indicated that type A blood was present on the articles I mentioned with the exception of the shirt which is down in the collection things. This shirt was tested and the amount of blood which might have present in that shirt was not of sufficient quantity to type. That meant it was not A, it was not B and it was not O. In other words we could not determine the blood type.

Q Do you know what type blood Shirley Craycraft had?

A I have been told by the coroner.

MR. BUSCH: I object to that. If the coroner wishes to testify to findings. It's hearsay of the rankest order.

THE COURT: Sustained.

MR. BERRY: No further questions.

MR. BUSCH: I have no questions. I renew my objection for the same reason and also for the fact it's been developed the testimony was immaterial. It wasn't even necessary. It hasn't been productive of anything. Once again I ask the testimony be stricken.

THE COURT: Any further basis to offer?

MR. BUSCH: Only it did not produce any material whatever. It was completely immaterial.

THE COURT: Objection overruled. You may step down.

Q When you say, on?

A Peghooks. There could be some knocked off.

Q Any under or behind stock?

A No.

Q Either under or laying down perhaps underneath?

A Yes.

Q All on display and open to the public?

A Yes.

Q Have you ever had any experience in your several years merchandising at Twin Fair with the delicacy of this type of container of cellophane or vacuum packed is broken or easily punctured?

A No, it's not that easily punctured.

Q You sure? You could take your finger --

A (Interposing) Yes, you could take that or an object.

Q Is it the case when there is an edge or raised edge that they are more fragile?

A If you have a raised, yes.

Q Have you had experience with packages of this type broken by people handling them? By patrons customers of the store?

A Yes.

Q Will you please indicate to me -- there is a blade -- there is a blade in this package. I don't know if you can see it. It appears to be the same shape and point and as Prosecution's

Exhibit. Could you pick out where it is in this package? Where this blade is?

A Approximately would be in the center.

Q Could you also look if you would on the center blade a finely embossed on the name Stanley trade name?

A Yes.

Q Point to it where it is marked blade?

A Right here. (Indicating)

Q Right by your finger?

A Yes. It's on the outside as opposed to turned back.

Q It's facing you through the clear?

A Yes it's on blade. Right.

Q I think you have testified on the pinboard display you could see whether -- the condition of the stock on the pinboard. You're not able to see the stock on the --

A (Interposing) What pinboard?

Q This that held this?

A I would have walked by it.

Q You didn't see it or the condition of the merchandise on it?

A That is what you talked about. Nothing that would call my attention.

Q This is in the area of the store where all the people have access?

A Yes.

and take awhile?

A If it's needed it's brought to the store and if it's overstock it isn't.

Q This could have stayed weeks or months in the stockroom until it is needed in the store?

A It could have.

Q The same could be true of the sawblades?

A The necessity of course that would be up to our jober. I doubt very seriously if it would have been on the stock.

Q Do you know if the stock was out this year in November? Did it come in one batch and one step?

A As I remember we had a shipment just once a week. Far as today I don't know.

Q You have a little bit of back stock?

A We could be sold out; we could have some left.

Q Due to the fact you have no inventory control you do not know if it's a good selling item?

A No, I don't know.

Q What is the practice when you have a display that has one of these pegboards with pins projecting? Where do you bring the merchandise out from? Do you putk the older things on the end to keep it moving?

A Supposed to, but it's not always done.

Q It's the technique of merchandising to put the older

on the outside?

A We try, but not always.

Q It is?

A Yes.

Q Is it accurate for me to suggest -- particularly in the given time of August 12 of this year -- the board of the cardboard display might have been on the outside in this tradition?

A If it was followed it would have but that tradition has not been pushed very hard recently.

Q You don't really know when this stock might have come into your stock -- or this item?

A No sir.

Q When people come into the store are they permitted to handle the merchandise in the area? Particularly the tool area?

A Yes.

Q Something like a self-service operation?

A Yes, it is.

Q Where do you take it, to a bagging and payment area?

A Right.

MR. BUSCH: I don't have anything else.

REDIRECT EXAMINATION

BY MR. SMITH

Q Mr. Bolin, during the month of August 1975 approximate

Q What?

A They make my feet sweat.

MR. BERRY: I didn't hear that.

MR. BUSCH: He says he doesn't wear those kind. They make his feet sweat.

BY MR. BUSCH

Q Have you ever been shopping -- you already indicated you shopped at the Twin Fair at Southern Village. Have you ever been shopping at the one here on Burnett Plaza?

A On occasion.

Q Prior to August 12 and 13 of this year?

A The last time I think I was out there was July.

Q What year?

A '75.

Q Did you go on other occasions by yourself or at someone elses request?

A Me and my sister go out there quite often she lives by the store.

Q Do you know what you would do when you would go to the store these times prior to August 13?

A Just browsing around at things.

Q Did you remember also certain purchases at the time?

A Buying incense at times.

Q Did you remember for looking for things in the tool department?

DR. SIMEON PALOMINO

Being previously sworn, by Court, testified as follows:

DIRECT EXAMINATION

BY MR. SMITH

Q Would you state your name for the record?

A Simeon J. Palomino, Medical Doctor and I work at Mercy.

Q We had your credentials in Court when you testified earlier. As part of your autopsy did you have occasion to type the blood the deceased Shirley Craycraft August 13th?

A Yes, I obtained the blood from the heart and sent it to Hemotology and the blood bank lab.

Q Was this under your direction and supervision?

A Yes. It's part of our pathology.

Q What was the type?

A Group A positive.

CROSS EXAMINATION

BY MR. BUSCH

Q Doctor were you called upon to examine the type or determine the type of blood found on any stain of clothing -- articles of apparel -- shirts or shoes?

A No.

MR. BUSCH: Thank you.

---

ascertain there size?

A I don't know.

Q All this type?

A Yes.

Q Did you compare with the number of vacancies on the ground?

A No.

Q Do you know of your own knowledge whether you sell this type of shoe?

A We sell this type of shoe. Yes.

Q How can you ascertain?

A There is a ticket. I don't know if it belongs to the shoe or not but still is what I have in the store.

Q Would the tickets have a number on it?

A Yes.

Q Have the department code on it?

A It show the department code. Yes.

Q Are you able to tell the Court whether or not you were missing any shoes after August 4?

A No, I'm not.

Q I'll show you what has been marked for purposes of identification State's Exhibit FF SS. Do these look familiar, generally speaking?

A They look the same type as the others.

Q Why?

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The Honorable Judge John W. Henderson
Common Pleas Court
Room #1
Clark County Court House
Springfield, Ohio

PSYCHIATRIC EVALUATION

NAME: George Washington Miller EXAMINER: Dr. Harold Fishbain

BIRTHDATE: August 8, 1951 DATE: December 4, 1975

The Judge referred this patient because he had been convicted of aggravated murder, and aggravated burglary under Section 2929.03 of the Ohio Revised Code.

This man stated that the Judge told him that he was to have a psychiatric evaluation following his conviction and because he had murdered someone. He, himself, felt that a perso needed a psychiatric evaluation who murdered someone because they must be crazy. I then explained to him that the Statute 2929.03 called for a psychiatric evaluation by law. He knew that his attorney was Tom Busch and knew that he would be going to the penitentiary or the electric chair. Ultimately, he was able to say that they are going to see if they should give him life or death. After he thought about it, he stated that it makes all kin of changes in someone that his freedom had been taken away and he had been wondering why this had been happening to him. When asked what he thought about that, he stated that the biggest portion of it is because he is black and from the very beginning he was marked. H stated that he has had no money, and he has to go along with the system, in fact, an old charge had been used against him to get him involved in this particular event.

When asked what his other charge was, he said that in 1972 he had gone to the penitentiary for one year because of breaking and entering. When he was asked what evidence there was against him, he stated that they insisted there were fingerprints inside the store and he began to rationalize this. When I asked him how he felt about all of this, he stated that he felt like he wanted to bust, and he wanted to holler, and it hurt a great deal. That really didn't make any difference whether he had Judges or Jury. He stated that his friends and relatives and lawyer had advised him to have the three Judges instead of a Jury.

When he was asked about his relationships, he said that his best one was with his sister and brother-in-law, and friends. When asked about his parents, he stated that his father

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was still quite old fashioned and that his stepmother and father had not come to see him very often while in jail, and he had not been talking to them very much in the past few years. A previous history in our chart revealed that he had been told to get out of the home in 1972 as he was accused of stealing something. Actually, he went on to say that there really wasn't anybody he could talk with and he has always had a problem talking with people about things that were important to him.

He stated that he hoped he got the electric chair because he would hate to go up for life for something he didn't do. He stated that he can't do "nothing," that he doesn't really believe this is happening to him and sometimes he thinks he is going crazy because the whole business constantly bugs you and that being in this little space makes it worse. He feels that he is worse off than anybody else in the jail, and even if he were to be paroled at 40, that at 40 he would be no damn good as he would be institutionalized, and there would be other changes also.

Previous mental health treatment included a stay in the hospital in 1972 under the care of Dr. Graves and the history, at that time, revealed that he was quite depressed and suicid and he had slashed his wrists. After discharge, it was suggested that he go to the outpatient service for treatment but he never showed up there. He did show up once again after that in the Emergency Services and was again advised to seek outpatient mental health treatm but he did not follow through. He felt what he wanted out of treatment, at that time, was to understand himself better, to find out why things keep happening the way they do, but his biggest thing is with people for it is hard for him to communicate and he needs a lot of attention. He stated that he had been trying to be somebody most of his life and to get on with other people as well as to get attention. He claims he loves everybody and has no enemies and he guesses that his girlfriends and his family love him. It is interesting that he wasn't able to remember any of the details of his previous hospitalization and state that this has always been a problem, that he can't remember very much and is one of the reasons he didn't get along very well in school. He did describe some dreams in which he thinks of girls and getting out of here, and about his brother in Korea.

When asked what he would do if he had to do it over again, say from age 18 and on, he stated that he wished he hadn't been so hard headed or stubborn, that he had listened to his mother more, and had a better education. He felt as if he had no will power and he had nobody real pushing him to do well. He refused to talk about his natural mother who died when he was

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years of age.

IMPRESSION: It is my belief that this is a chronically depressed man whose diagnosis is probably depressive neurosis. He is not a psychotic person. He is unable to talk about an event that is most important to him which is the death of his natural mother at age five. He has not succeeded very much in his life, and has had frequent difficulties both in school and out. He has spent time not only in boys' institutions but also in an adult institution, and this indicates that he has not learned much from his mistakes as he has been chronically depressed. He does not have any thinking disorder. I believe he understands what is going on in his life right now and what the consequences of his conviction means to him. I believe that he was competent to stand trial and is competent to understand all of the realities he is facing at the present time.

HAROLD FISHBAIN, M.D.
Medical Director

HF/llp

cc: Common Pleas Probation Department.

DETAILS OF INSTANT OFFENSE:

In response to ADT alarm from the Twin Fair, Incorporated, located at 532 South Burnett Road between 11:31 p.m. on August 12, 1975, and 2:41 a.m. on August 13, 1975, Police Officers of the Springfield Police Department discovered that the establishment had been burglarized.

Upon further investigation of this burglary, they entered the store and found Shirley Craycraft lying in a pool of blood in the sporting good's aisle with his feet to the north and head to the south and surrounded by a large pool of blood. Officers observed at first glance that he had suffered a severe wound to the top of his head and also that he was apparently dead at this time.

The store was checked for possible suspects and none were found at the time of the Officers initial search. The deceased was taken to the Mercy Hospital following the preliminary examination by the coroner for Clark County, Ohio, and an autopsy was performed.

Further investigation by arresting Officers revealed that the lock on the rear door to the Twin Fair Store had been cut with a hacksaw and there were numerous sacks filled with items in various parts of the store which were apparently being readied to be removed from the store. The jewelry counter display case had

been broken into by the front glass being broken out of the two display cases. Merchandise in several parts of the store were apparently disturbed by the burglars and it could not be determined with certainty at the preliminary check whether anything had been taken from the store.

Later on during the morning hours after daylight had appeared, Officers checked the area further and found a blood stained shirt and a pair of blood stained shoes on the top of the roof in the vicinity of the Radio Shack which is in the immediate area of the Twin Fair Store.

It was further determined through intensive investigation that there were prints on the saw blade used in removing the lock from the rear of the store. These prints were lifted by the Crime Lab personnel and later were identifiable as the prints of the defendant.

On August 15, 1975, a warrant was filed against the defendant charging him with Aggravated Murder in this complaint. He was arrested and confined to the Clark County Jail for further proceedings.

He was indicted by the August term of the Clark County Grand Jury, which met August 28, 1975, and charged as heretofore indicated.

His case was set for trial on October 14, 1975, but was continued upon a Motion of his Court appointed attorney for additional time to make preparations in his case. His case was set for trial November 12, 1975, before a three Judge panel consisting of Judge John W. Henderson, Judge Richard T. Cole, and Judge Gerald F. Lorig, in accordance with the provision of Section 2945.06 of the Revised Code of Ohio, having been charged with an offense punishable by death.

On November 18, 1975, after a five day trial the defendant was found Guilty of Count One, Aggravated Murder With Specifications; Count Two, Aggravated Robbery; and Count Three, Aggravated Burglary. Pursuant to Section 2947.06 of the Revised Code of Ohio the defendant was ordered to have a psychiatric examination and Dr. Harold Fishbain of the Mental Health Program of Clark County, Ohio, was appointed to conduct an examination and prepare a written statement under oath concerning the mental condition of the defendant and file the same in this cause.

A Presentence Investigation Report was also ordered by the panel of Judges.

Victim: Shirley M. Craycraft was age 62 at the time of his death and was an employee at the Twin Fair Store as a janitor and watchman.

The coroner for Clark County, Ohio, George P. Anderson, M.D. submitted a report indicating that the cause of death for Mr. Craycraft was gunshot wound in the head, compound fractures of the skull, and subarachnoid hemorrhage.

DEFENDANT'S VERSION:

The defendant made no statement concerning his involvement in this offense and was not in any way questioned or approached as to an explanation for his action by the investigating Officer. He did not take the witness stand during the trial and made no statements to Police Officers concerning his involvement in this offense.

PRIOR RECORD:

Juvenile:

DATE	OFFENSE	PLACE	DISPOSITION
4/9/66	Runaway	Springfield, Ohio	Indefinite detention
4/20/66	Burglary	Springfield, Ohio	Dismissed
5/6/66	Burglary D/S	Springfield, Ohio	Suspended sentence to the Ohio Youth Commission
7/7/66	Petit Larceny	Springfield, Ohio	To pay restitution, 2 weeks detention, fined $25.00 and costs
1/9/67	Malicious Destruction of Property	Springfield, Ohio	Suspended sentence to the Ohio Youth Commission

Guns, ammunition and rifles were stolen from the Western Auto Store.

1/10/67	Burglary	Springfield, Ohio	Unknown
6/20/67	Petit Larceny	Springfield, Ohio	Suspended sentence to the Ohio Youth Commission; probation and to seek counseling at Guidance Clinic
12/11/67	Shoplifting	Springfield, Ohio	Sentenced to the Ohio Youth Commission
8/3/68	Juvenile Delinquency	Springfield, Ohio	Sentenced to the Ohio Youth Commission
9/1/68	Escaped from Fairfield School For Boys	Springfield, Ohio	Returned

Adult:

12/29/69	Breaking and Entering	Springfield, Ohio	Probation for 5 years
6/2/72	Inhaling Vapors	Springfield, Ohio	Fined $50.00 and costs; 3 days jail
6/28/73	Malicious Entry	Springfield, Ohio	Probation terminated, sentenced to the Ohio State Reformatory

It is noted from his record of probation supervision that there were a number of problems involved in the area of job placement and the environmental adjustment of this defendant.

FAMILY HISTORY:

Defendant: On August 8, 1951, the defendant was born at Springfield, Ohio, the fourth child of John and Osie Miller.

This family is a result of a second marriage of the defendant's father.

In 1958 the defendant's mother died of a brain hemorrhage and the father did not remarry until 1963, to Anna Mae who had grown children and no further children were born as a result of this marriage.

The factual situation of his adjustment to the new arrangement of his father resulted in resentment and outright rebellion. He refused to obey his stepmother or to do anything she asked him to do. As a result of this inability to comply with the wishes of his stepmother, he was placed in the Clark County Children's Home from 1963 to 1966.

In addition to being at odds with his stepmother, because as the defendant indicated she tore up the picture of his real mother he has been unable to comply with the directions and assistance offered him by his father.

While discussing this matter, he indicated that his father was mean and abusive to him and did not treat him with love and affection, as a result he was continually at odds on many points of his parental direction and took every opportunity to leave home, not only when his stepmother was around but also when his father was around.

In order to earn a living for his family the defendant's father worked for the City of Springfield in addition to having a job which he worked three nights a week at a local bank to earn sufficient money to take care of his family. He has never been one who would discipline his children and this responsibility was left to his wife since he was away from home most of the time. At this point, both parents have given up on this defendant and feel that he is unable to adjust in a normal family situation, as a result he cannot make it among strangers in the outside world.

MARITAL HISTORY:

Although this defendant has never been married, he has lived in a family relationship with at least two persons within the knowledge of the investigator.

When this defendant was released from the Ohio State Reformatory in March of 1974, for a short time he was at the home of his parents but due to his inability to adjust there moved in

with his brother to share an apartment on East Main Street.

At the time of his arrest he was rooming at the Summer Street address because as he states he was grown and able to stand on his own two feet and did not need the help and assistance of his parents.

EDUCATION:

The records of the Springfield schools reflect that this defendant has always been a slow learner while in classes at Emerson and Fulton Schools.

This lack of quick ability to learn, however, did not prevent him from passing all of the tests necessary for entrance into the Youth Job Corps. He was accepted into this activity while on probation in 1970.

The records reveal that he had some difficulty at the Eddinburg, Indiana Job Corps School where he entered on April 6, 1970, to go into the area of landscaping.

He later transferred to the Attabury Job Corps where he was engaged in a trainee program leading towards proficiency in welding.

The record of this institution, the Coyne American Institute, Extended Services Division reflect that his Basic Oxy-Acetylene and Arc Welding course gave him a proficiency, employability rating in the basic welding skills, blueprint reading, and numerical

skills of A.

On August 31, 1971, at the Job Corps Center at Golconda, Illinois, he was promoted to the rank of specialist in recognition of the completion of progress requirements and occupational skills achievement.

A further promotion of senior specialist was granted to him on November 23, 1971, and he was given a complete certificate of achievement at the Golconda Job Corps Conservation Center on December 17, 1971.

RELIGION:

Since his early childhood this defendant has attended the Spiritual Church of God In Christ, where his parents have always been members. He always sang in the choir and his ability to sing was further confirmed by the minister of Mt. Carmel Baptist Church where he was also in attendance for a few years.

It is this area of religion where the defendant seems to have most divergent opinions as to the beliefs and actions of his parents. While discussing his parents religious fervor and believing in righteousness and following the holy path, he indicates, however, that their actions are much different in the home and their love for the family unit has many fallacies.

He cites as an example the distant method whereby the father

regarded the children and their inability to enter into a whole-hearted pattern of action in the family unit. This has caused him to resent any advise, direction from either his father or his stepmother.

It is in this area he feels unloved and unwanted by the other members of his family.

INTERESTS AND LEISURE-TIME ACTIVITIES:

While this defendant was living with his parents, their main and chief complaint was that he would run all night and sleep most of the day.

They strongly suspected that he was on some kind of pill or other hallucinating drug but has never been able to confirm this.

The only concrete evidence of his being involved in drugs of any nature was when he entered a plea of guilty to a charge of inhaling vapors on June 2, 1972.

HEALTH:

Physical: At the present time the defendant indicates that his health is in very good condition and he was able to perform his job at the Wickham Piano Plate without any difficulty.

It is noted, however, that when the defendant was checked for the Job Corps in 1970 that there was some question as the condition of his chest.

In addition, he is subject to epileptic attacks and it is not known at this time when he had his last seizure.

At five feet nine inches tall he weighs one hundred forty pounds, he is able to perform laboring work without any difficulty.

Mental: It is well established that this defendant has some difficulty in dealing with the attitude and the actions of people in his immediate family as well as those on a community wide basis.

The records reflect that at about the age of 14 he was struck in the head at school and was admitted to Mercy Hospital. Since that time he has been at various times under the care of Dr. Leber as a youth and the Guidance Center.

It is noted from the contact of this Officer as the defendant's Probation Officer during 1969 that he had no behavioral problems with this defendant. However, it is noted from the records of the Adult Probation Department that his supervision while on probation involved many situations of stress and conflict due to his inability to follow sound directional advise.

This resulted in a termination of his probation in June of 1973.

On the basis of Section 2929.03 of the Revised Code of Ohio this defendant was referred to have a psychiatric evaluation

through Mental Health Services for Clark County, Ohio, to be performed by Dr. Harold Fishbain.

This report details much of the information in the Presentence Investigation Report and substantiates many of the impressions of this defendant's actions as herein detailed.

Dr. Fishbain concludes in the final phase of this report the following:

"It is my belief that this is a chronically depressed man whose diagnosis is probably depressive neurosis. He is not a psychotic person. He is unable to talk about an event that is most important to him which is the death of his natural mother at age five. He has not succeeded very much in his life, and has had frequent difficulties both in school and out. He has spent time not only in boys' institutions but also in an adult institution, and this indicates that he has not learned much from his mistakes as he has been chronically depressed. He does not have any thinking disorder. I believe he understands what is going on in his life right now and what the consequences of his conviction means to him. I believe that he was competent to stand trial and is competent to understand all of the realities he is facing at the present time."

EMPLOYMENT:

This defendant had been working for about three weeks at the Wickham Piano Plate Company as a pourer, earning $4.00 per hour. He was working the second shift. He stated that he got hurt on the job and his boss told him to take a couple of days off, this was on Tuesday and he was picked up on Friday. The record, however, reflects that this defendant punched out on his card and did not return to work.

In June of 1973 he was employed at the M & H Fabricator as a welder, earning $2.65 per hour and was discharged December of 1973, for unsatisfactory work condition.

The record further reflects that he was hired on a full time basis for the Twin Fair Store on April 24, 1972, and worked there until May 19, 1972, when he was discharged for unsatisfactory work. His last day of work was May 13, 1972.

Respectfully submitted,

Lymon Alexander
Chief Probation Officer

LA:cad
Dict: 12/16/75

3/1/74

COURT OF COMMON PLEAS, CLARK COUNTY, OHIO
DEPARTMENT OF PROBATION

Case No. 75-CR-348

PRESENTENCE REPORT

Name: George Washington Miller

Address: 801 Sumner Street, Springfield, Ohio

Telephone: None Military Service: None

Date Referred: November 18, 1975 Jail Time Credit:

Investigating Officer: Lymon Alexander

Sex	Race	Age	Date of Birth	Social Security No.	Marital Status
Male	Black	24	8/8/51	286-52-1004	Single
Dependants	Education		Employment	Religion	
None	Ninth Grade		No	Protestant	
Prior Record	Juvenile [X] Yes [ ] No		Adult [X] Yes [ ] No		
FBI No.	Ohio State BCI No.		Springfield P/I No.		
Unknown	Unknown		20-550		

Offense Charged:

Statutory Penalty

Complainant: Sta

Plea: Not Guilty

Custody or Bond:

Prosecutor: James
Defense Counsel: COURT APPOINTED

Detainers or Cha

Codefendants: No

DISPOSITION:

Ct. 1: Aggravated Murder While Committing Aggravated Burglary and Aggravated Robbery, Section 2903.01 ORC

SPECIFICATION TO THE FIRST COUNT - ONE: The Grand Jurors further find and specify that the offense charged in Count One was committed while the defendant was committing Aggravated Robbery.

SPECIFICATION TO THE FIRST COUNT - TWO: The Grand Jurors further find and specify that the offense charged in Count One was committed while the defendant was committing Aggravated Burglary.

Ct. 2: Aggravated Robbery, Section 2911.01 ORC

Ct. 3: Aggravated Burglary, Section 2911.11 ORC

PENALTY:

Ct. 1: Aggravated Murder - Life or Death

Ct. 2: Aggravated Robbery - Felony First Degree - MINIMUM: 4, 5, 6, or 7 yrs. MAXIMUM: 25 yrs. and/or $10,000.00 Fine

Ct. 3: Aggravated Burglary - Felony First Degree - MINIMUM: 4, 5, 6, or 7 yrs. MAXIMUM: 25 yrs. and/or $10,000.00 Fine

24-5871 Ext. 2
, Spfld., OH
325-0406

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Date:

on, Gerald F.

In the Court of Common Pleas of Clark County, Ohio

THE STATE OF OHIO, Plaintiff, vs. GEORGE WASHINGTON MILLER, Defendant.	CASE NO. 75-CR-348

TRANSCRIPT OF PROCEEDINGS before the Honorable John W. Henderson, Judge; Honorable Gerald F. Lorig, Judge; and Honorable Richard T. Cole, Judge; at the Courthouse, Springfield, Ohio, on Friday, December 19, 1975.

APPEARANCES:

MR. JAMES A. BERRY
Prosecuting Attorney

MR. ELBERT G. SMITH
Assistant Prosecuting Attorney

On behalf of the Plaintiff

MR. THOMAS H. BUSCH
Attorney at Law

On behalf of the Defendant

- - -

W I T N E S S E S

	Direct	Cross
For the Plaintiff:		
None		
- - -		
For the Defendant:		
Dr. Harold Fishbain		4
- - -		

PROCEEDINGS

THE COURT: Case number 75-CR-348, the State of Ohio verses George Washington Miller, Defendant. This matter was tried by the Court. The Defendant was found guilty of Aggravated Murder while committing Aggravated Robbery and Aggravated Burglary.

Accordingly, the Court ordered a Presentence Investigation and a psychiatric examination pursuant to the Revised Code Section 2929.03. The examinations have been completed and the copies of the Presentence Investigation Report and the psychiatric examinations have been delivered to counsel. Is that not correct, Mr. Busch and Mr. Berry?

MR. BERRY: Yes, Your Honor.

MR. BUSCH: That's correct, Your Honor.

THE COURT: The matter is now before the Court on a hearing concerning any mitigating circumstances as required by the Revised Section 2929.03 (D). The Court will now hear testimony and any other evidence stated by the defender and the arguments counsel for the defense and prosecution may have. You may proceed accordingly, gentlemen.

MR. BUSCH: I presume, Your Honor, that we proceed first?

THE COURT: That's correct, Mr. Busch. You may proceed.

MR. BUSCH: If the Court please, I would like to call Dr. Fishbain to the stand as on cross-examination.

THE COURT: Very well.

- - -

DEFENDANT'S CASE

The Defendant, to maintain the issues on his part, introduced the following evidence:

DR. HAROLD FISHBAIN

the witness, having been duly sworn,

was examined and testified as follows:

CROSS EXAMINATION

BY MR. BUSCH:

Q Doctor, would you state your full name and office address to the Court?

A Harold Fishbain, M.D. 1345 North Fountain Avenue, Springfield, Ohio, 45504.

Q Are you associated with the Mental Health Services For Clark County?

A I'm the medical director.

Q And you are the psychiatrist who produced the psychiatric evaluation dated December 4 of George Washington Miller?

A I did.

Q Doctor, is it your understanding that he is not a psychotic or a mentally deficient offender? Is it your belief or opinion?

A That's right.

Q How many opportunities did you have to interview Mr. Miller?

A I interviewed Mr. Miller one time on the date stated.

Q Did you have an opportunity to discuss with either Mr. Alexander or anyone else his prior criminal record dating back to April of 1966?

A I did not.

Q Would it affect your decision or your opinion of Mr. Miller, I should say, as a mentally deficient offender if you were aware of the extent of his criminal activities in the past ten years? Would it affect your opinion?

A No, it would not, Mr. Busch.

Q I am referring to the definition as set out in 2947.24 and a subsection of the code, subsection A stating, "mentally retarded offender means any person who is adjudged mentally retarded, as defined in Section 5125.011 of the Ohio Revised Code, who exhibits criminal tendencies and who, by reason thereof, is a menace to the public." Do you agree or are you willing to accept that formula of definition as to someone who is mentally deficient?

A I am, but Mr. Miller is not mentally retarded, Mr. Busch.

Q They indicate, however, anyone "who exhibits criminal tendencies and who, by reason thereof, is a menace to the public." Would you agree that anyone who has, since April 9, 1966, committed the offenses as set forth on page four of the Presentence Investigation --- and may I hand you a copy so that you can be advised. Do you have one?

A I have one right here.

Q All right, thank you. And continuing on page five thereof, would you in your professional opinion define such a person as a person whc exhibits criminal tendencies?

A Well, I would have ---

JUDGE COLE: May I have that question repeated, please?

(WHEREUPON, the question referred to was read back.)

THE WITNESS: I think I would have to answer I suppose if we agree on what we mean by criminal tendencies, I would have to answer that yes. If there are enough violations to warrant some kind of adaptation to live situations by breaking the law, if that's what we mean by that.

BY MR. BUSCH:

Q Then, you could in your professional opinion describe George Washington Miller as on the basis of this synopsis

of his criminal activity since 1966, you could describe him as exhibiting criminal tendencies?

A I would have to answer that yes. I wonder if I might go on though?

Q Yes, please.

A However, from my point of view that does not make him either mentally retarded or mentally deficient or the reverse. That doesn't enter into that behavior at least from my point of view.

Q But I'm referring to an actual definition, an actual definition which we must all be governed by.

A If you're talking about the frequency of the behaviors, I would suggest that obviously he would have criminal tendencies. That's what the definition is.

Q Do you believe that such an extensive amount of criminal activity in a relatively brief period of time and relatively brief life span suggests some form of psychosis?

A No, sir. I think I've --- I think I took that into consideration in the last paragraph of my report in which I suggested that he had spent time in both juvenile institutions and adult institutions indicating that he has not learned much from his mistakes. I do relate that to the fact that he may be chronically depressed, a chronically depressed person; but he does not have a thinking disorder.

Therefore, he is not psychotic.

Q At what point, Doctor, would someone who has, let us say for a hypothesis, who has exhibited these criminal tendencies as Mr. Miller has, at what point would you consider him to be psychotic? What missing element would have to be introduced into the formula for a man like Mr. Miller who exhibits these many crimes in this period of time to be psychotic? What is missing in his make-up?

A That would lead me to believe he's psychotic?

Q Yes.

A Well, Mr. Busch, psychosis may be manifested by mood, behavior and thinking changes in one's life. But the basic motivation behind it is a thinking organization or decompensation or, well, primarily that's really what it is or development in that area. So, that in fact people who develop psychotically and then decompensate from time to time under stress are unable to think clearly, think straight, think rationally or think in an organized way. Now, what I hear you saying and which I disagree with is that because the behavior repeats itself is not motivated in my opinion by a thinking disorder in Mr. Miller. It may be motivated by something else, but it is not motivated by a psychotic development.

Q His inability, chronic inability, as you have indicated,

to learn much from his mistakes is not ---

A That does not make him a psychotic person.

Q I see, but again I'm probing into what missing component, what missing element, would make the difference between a psychotic or a non-psychotic, a mentally deficient or non-mentally deficient offender who has a history of this type of behavior? Does he have to have some other bazaar acts or aberrations?

A By and large most behaviors or most mood problems with people do not make sense to most of us. That's how we kind of sense that there's something wrong. But again, you're asking me what the missing element is. He is not a mentally psychotic person.

Q Well, the word "psychosis" is not a diagnostic term is it?

A Right.

Q What I'm looking for is the missing element of personal disorder which would either make him psychotic or not psychotic or group of disorders. Something is missing in his psychological make-up in your professional opinion that makes him not psychotic?

A I have already defined him as a chronically depressed person and that is his problem, depressive neurosis. Now, that means that out of his awareness that he has conflicts

which he has been unable to resolve over a long period of time stemming either from previous unresolved mental periods in his life or stemming from unresolved traumatic periods in his life; and one of the major traumatic periods in his life was when he was five years old and his natural mother died. Any youngster whose mother dies is bound to be affected by that and Mr. Miller, in fact, had a great deal of difficulty at least on the one session in talking to me about that and in looking over his old record at our unit he wasn't willing to talk about it much even then. So, I'm suggesting that his diagnosis would be depressive neurosis which means he is a chronically depressed person. No self-esteem, very little self-confidence, the inability to view life in his situation in a positive way.

Q Do you believe that this chronic depressive neurosis as you have diagnosed it is either the cause or one of the causes of his criminal conduct in the past ten years?

A I would say that's likely, that there is an association. How close it is I cannot say, but it is likely that there is.

Q It is normal or would it be within the realm of normal mental activity for someone who is chronically depressed such as Mr. Miller has been for the bulk of his life to

express or to act out these depressions by criminal conduct?

A Again I think there could be an association. I just can't say exactly what the connection is at this point.

Q Is it possible that there is no connection between the depressive neurosis and these criminal activities?

A That would be unlikely. There must be some relationship between current life behavior and what's gone on in the past.

Q Doctor, you had indicated in your report that either through the activities of the Mental Health Services or by your own personal investigation into Mr. Miller's medical history he has had prior medical and mental health treatment. Could you elaborate on the details as you have indicated on page two of your report?

A Well, I did discover and before I even saw Mr. Miller he had in fact been in our program before and did review the chart that we had on record which indicated that, as I pointed out, that he had come in suicidal and depressed. The two often can be associated and manifested by slashing his wrists and that in the first day or so on the unit that there was a good deal of evidence he was immobilized. He actually could not function. After that, according to that chart, he was asked to come to the outpatient services

which it was felt he needed badly at the time and in fact did not do that, but then came back to the emergency services again in a very low mood state and was advised to follow up with the previous recommendation. I was impressed that Mr. Miller could tell me that at that time what he was seeking or what he would have sought in treatment which made a lot of sense to me in terms of his diagnosis and his needs. Now, how it is that he did not make it to the outpatient service, I cannot answer that.

Q But he actually did slash his wrists?

A Yes, he actually did. That behavior did manifest itself.

Q You have indicated also in your report that Mr. Miller had revealed to you that he has a frequent, perhaps even chronic, disability in recollection. That he frequently loses whole segments or whole sections of recollection, his inability to remember certain things. What would this be called in psychiatric terminology?

A Well, that was one area that I gave a lot of thought to and one would have to divide it either on a brain disease or organic basis or is it on functional or psychodynamic basis? I concluded it was on a psychodynamic basis and that the whole issue of or getting segments of certain things can be related to the development in one's personality in two areas. One of two areas are either the

person is an obsessive --- and obsessives are known to have poor memories from past details of events and especially if they're charged with any kind of emotional content and a passive aggressive approach to life. By just simply forgetting is kind of a passive aggressive in terms of people's interaction with each other or transaction with each other. Either one may be operating in Mr. Miller's behalf.

Q You excluded the possibility then for brain disease?

A Yes.

Q Did you arrive at a conclusion as to which of these, the obsessive or passive aggressive, relates to Mr. Miller?

A I would say more passive aggressive than anything else.

Q Isn't that frequently competent of psychotic or mentally deficient behavior?

A Well, passive aggressive can be a behavior coincident with the personality developments of anybody. We all at one time or another use a passive aggressive behavior.

Q Would a history of criminal activity, antisocial or asocial behavior such as Mr. Miller's background suggest an abnormal amount of activity in this area on his part?

A Well, I think, I don't know that that in itself has a yes or no answer. It's a relative kind of thing. It seems apparent that the life style that Mr. Miller has lived in

terms of adaptation. It's interesting that at one point in his life he came into our program with what appeared mental symptoms at the time. Now, at that time he can't participate in criminal activity. At other times he is obviously participating in that behavior. So, Freud once said you can go in either direction. He called it crazy behavior or criminal behavior, but I'm suggesting that this indicates a kind of a life style approach to adaptation.

Q If someone, and again please correct me if I'm misusing this terminology or using it clumsily or out of context, but would an accessive acting out of either or these tendencies suggest mental deficiency?

A I think the definition of mental deficiency in the statute refers to mental retardation. Mr. Miller is not mentally retarded.

Q Well, this definition, of course, is the one which we must use as a guideline in a hearing of this sort at least to my understanding.

MR. BUSCH: I have no more questions at this time, Your Honor.

MR. BERRY: I have none.

THE COURT: Very well, you may step down.

MR. BERRY: I assume this witness is free to go, Your Honor?

MR. BUSCH: Unless you wish to recall him.

JUDGE COLE: Just a minute. Will you resume the stand, please, Doctor? As I understand it you didn't feel that Mr. Miller was mentally deficient using the definition that Mr. Busch gave you, but you included mental retardation?

THE WITNESS: That's right.

JUDGE COLE: Does Mr. Miller in your opinion have a mental deficiency disregarding the --- I understand you are saying he's not mentally retarded?

THE WITNESS: But from our point of view either is he mentally ill.

JUDGE COLE: Okay. Does he have a mental deficiency?

THE WITNESS: Your Honor, that's not a psychiatric term.

JUDGE COLE: Okay. Does that mean you can't answer that question?

THE WITNESS: I cannot answer it. I've looked at the statute many times and I'm always puzzled. I can say he is not mentally retarded from my point of view and he is not mentally ill.

JUDGE COLE: Thank you. I have no other questions.

MR. BUSCH: I have nothing further.

THE COURT: You may step down.

MR. BUSCH: Thank you, Doctor.

THE COURT: He will be excused. Is there any further requirement of him?

MR. BERRY: No, Your Honor.

MR. BUSCH: No. Thank you, Doctor, very much.

THE COURT: Thank you, Doctor.

(WHEREUPON, the witness was excused.)

- - -

MR. BUSCH: I have nothing further in the way of evidence at this point.

THE COURT: Mr. Busch, does the Defendant wish to proceed under this portion of the Revised Code 2929.03 which the offender may choose to make a statement, not under oath, in which event it is not subject to cross-examination? I want him to be aware of this and call it to your attention. If you wish to, this would be the proper time to offer the same if he so wishes to proceed.

MR. BUSCH: Your Honor, I have discussed with Mr. Miller his opportunity under 2929.03 (D) of the Code his right to make the statements either under oath or affirmance or without oath and he elects not to make a statement. Is that correct, Mr. Miller?

THE DEFENDANT: Uh-huh.

THE COURT: He is responding that he does not wish

to, is that correct?

MR. BUSCH: That he does not wish to.

THE COURT: Very well. There is nothing further for the defense to offer at this time?

MR. BUSCH: Not in the way of evidence, Your Honor.

THE COURT: That's what I mean, any evidence or I don't know whether that was classified as evidence. That is why I thought it would be appropriate.

JUDGE COLE: I think the record should show that to Mr. Busch's question to him the Defendant nodded.

THE COURT: Very well.

MR. BERRY: The State has nothing to offer.

JUDGE COLE: His answer is affirmative.

THE COURT: Very well. Does the State wish to produce anything?

MR. BERRY: The State has nothing, Your Honor.

THE COURT: Very well. The psychiatric evaluation, of course, has been submitted to the Court and to the Presentence Investigation. Counsel may proceed with argument at this time if they so desire. Mr. Busch?

ARGUMENT ON BEHALF OF DEFENDANT

MR. BUSCH: Thank you, gentlemen. If it please the Court, counsel: briefly, I feel the main thrust of an inquiry of this type is a determination, at least in this

particular instance, of whether "the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." I was quoting verbatim 2929.04 subsection (B) (3) of the Ohio Revised Code. Proceeding from that to words and phrases of Ohio jurisprudence for the statutory definition of a mentally deficient offender one observes Section 2947.24 which defines or describes what the Ohio Revised Code presumably with all of the ramifications of the interpretations of the term means by quote "mentally deficient" using exactly the same words and terminology as are employed in the previous section that I just mentioned.

If it please the Court, I submit respectfully to you that this conduct of criminal activity on the part of Mr. Miller, dating from April of 1966, that history of mental illness, his hospitalization for intervals of serious mental illness, his efforts at suicide, the periods of total disrecollection of events, a depressive neurosis which, as Dr. Fishbain indicated, almost inevitably must be connected with passive aggressive behavior which he indicated, I think, clearly indicated the existence of criminal tendencies "and who, by reason thereof," paraphrasing "is a menace to the public." I cannot think of

a clearer indication of demonstrable mental deficiency as defined by the statute.

I, not being a psychiatrist, even a psychologist, will be the first to acknowledge what must be an extremely difficult task as Dr. Fishbain indicated presumes to reconcile some of the complex terminology to these mechanical definitions of the Code; but nonetheless these definitions must be those which guide all of us.

In evaluating Mr. Miller as either being or not being a mentally deficient offender, I respectfully submit, gentlemen, that with all of the evidence before you with the psychiatric report and with Dr. Fishbain's testimony and with the ample indication of the definitions which we must adhere to as provided by the Code, I urge upon you that this man is by any definition even the most liberal definition or strict, as you will, definition a mentally deficient offender. I ask that you so consider him.

MR. BUSCH: Thank you.

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ARGUMENT ON BEHALF OF THE STATE

MR. BERRY: If the Court please, it seems somewhat inconsistent even to be here on a mitigation hearing when the Defendant positioned all through the trial and

presumably up to this point that he didn't even commit this act. It seems to me that the purpose of this type of a hearing and the reason for this law is to when someone has been convicted of this offense and is clear that he did it and he or she admits the offense, then should come in and offer evidence why they should not be given the death penalty and there's not any of that here.

As a matter of fact, the only evidence we have heard in this hearing has been to the contrary. That there's nothing in the way of mental illness or mental deficiency or mental retardation, and I am certain what the statute had in mind in these cases is where that the mind is of such a state that the person is an almost idiot or imbecile type person whose mental capacity itself doesn't really comprehend what they were doing in such a situation. The evidence belies that completely.

If there was ever a case --- if the death penalty means anything --- if there was ever a case the death penalty should be imposed, it's this case, it's this set of circumstances. While committing a crime, a burglary, stealing, this man, in order to perfect that, had to kill someone; and he did it.

I submit that that does not indicate any evidence of deficiency. Rather quite the contrary. In his mind

this was a necessary part of the whole act.

Everything we have heard from the Defendant on the witness stand is belied by his conduct and his actions even to the point of the shoes he's wearing today which he claims he couldn't possibly wear that night, the same type that were found on the building, because they made his feet sweat.

We still haven't heard from this Defendant. Even when he's here, his life is in the balance, he offers nothing as to why this Court shouldn't impose the law as it is written on the books, and that's exactly what the United States Supreme Court had in mind. Exactly what the legislature had in mind that this should be the penalty for the taking of someone's life unless there is something to offer in mitigation of that sentence. We have heard absolutely nothing.

- - -

REBUTTAL ARGUMENT ON BEHALF OF THE DEFENDANT

MR. BUSCH: Gentlemen, if I could, just brief rebuttal. I think no more really needs to be said except again to call the Court's attention to Section 2947.24 (B) of the Ohio Revised Code in which they define using language virtually identical in many respects in that used today and in his report by Dr. Fishbain. "Who exhibits

criminal tendencies, and who by reason thereof is a menace to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsive, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity in learning from experience," the inability to learn from his own mistakes as stated today by Dr. Fishbain as reiterated in his report, "marked deficiency of moral sense or control."

Gentlemen, we have I suppose, perhaps, as close an example and impersonation of these elements of mentally deficient offender as we're probably ever likely to see. I again urge upon you the indication of this rule to him. I believe that even the strictest interpretation, Dr. Fishbain's comments and report would indicate that he is in every sense of the word as defined by statute subject to this provision.

MR. BUSCH: Thank you.

- - -

THE COURT: Anything further to be offered at this time in the way of argument?

MR. BERRY: The State has nothing further.

MR. BUSCH: Nothing further.

THE COURT: The Presentence Investigation Report and the Psychiatric Evaluation Report originals thereof will be admitted into evidence as part of the case.

MR. BUSCH: Your Honor, if I could interpose, there is at least one item in the Presentence Investigation Report which I would ask the record to show as corrected. I'm referring to page four.

THE COURT: Of which report, Mr. Busch?

MR. BUSCH: The Presentence Investigation Report, Your Honor.

THE COURT: Yes?

MR. BUSCH: It indicates in Defendant's version that Defendant did not take the witness stand during the trial. I think we will all recall that he did take the witness stand during the trial. I would ask the record to make that amendment to the investigation report.

THE COURT: The Court does recall that that is correct and the report will, accordingly, be amended so that it will indicate that he did take the witness stand during the trial, et cetera.

MR. BUSCH: Thank you.

THE COURT: Very well. The Court will retire to chambers and consider this matter and then notify counsel when it is ready to report.

(HEARING CONCLUDED)

- - -

STATE OF OHIO)
) SS.
COUNTY OF CLARK)

I, Linda M. Lyons, a Registered Professional Reporter, do certify that on the 19th day of December, 1975, I made a stenographic record of the hearing of the within case, number 75-CR-348, before The Honorable John W. Henderson, Judge; The Honorable Gerald F. Lorig, Judge; and The Honorable Richard T. Cole, Judge; that the foregoing is a correct and complete transcript of all proceedings offered or received.

Linda M. Lyons
Official Court Reporter - RPR

Court of Common Pleas
Springfield, Ohio

June 22, 1977

In the Court of Common Pleas of Clark County, Ohio

THE STATE OF OHIO,	:	CASE NO. 75 CR. 348
Plaintiff,	:	
vs.	:	FINDING OF THREE JUDGE PANEL ON MITIGATION HEARING - (2929.04 B, Ohio Revised Code)
GEORGE WASHINGTON MILLER,	:	
Defendant.	:	

After due consideration of the reports, testimony, other evidence and arguments of counsel submitted to the Court, pursuant to Revised Code 2929.03 D the panel of three (3) judges unanimously finds that none of the mitigating circumstances listed in 2929.04 B of the Revised Code is established by a preponderance of the evidence.

JOHN W. HENDERSON, Judge

GERALD F. LORIG, Judge

RICHARD T. COLE, Judge

IN THE COURT OF COMMON PLEAS, CLARK COUNTY, OHIO

State of Ohio, :

Plaintiff, : No. 75-CR-348

-vs- :

George Washington Miller, : ENTRY

Defendant. :

The defendant herein, George Washington Miller, was this day, to-wit: December 19, 1975, brought into Court in custody of the Sheriff and was represented by Counsel, and having been convicted on November 18, 1975 of Aggravated Murder, in violation of Section 2903.01 of the Revised Code of Ohio and the Specification therein, and Aggravated Robbery, in violation of Section 2911.01 of the Revised Code of Ohio and Aggravated Burglary, in violation of Section 2911.11 of the Revised Code of Ohio, and was informed by the Court of the verdict of the Three-Judge Panel, and informed of the pre-sentence investigation, a hearing having been had, the Court finds that none of the mitigating circumstances in Division B of the Section 2929.04 of the Revised Code of Ohio have been established, and the defendant was further inquired of if he had anything to say why judgment should not be pronounced against him, and showing no good and sufficient cause why judgment should not be pronounced, - - -

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the said defendant, George Washington Miller, be taken hence by the Sheriff of this County, and within the next thirty (30) days from this date, to the Ohio State Penitentiary at Chillicothe, Ohio and by said Sheriff turned over to the custody of the Warden of said Penitentiary and under whose custody and direction said defendant, George Washington Miller, shall be kept until the day hereinafter designated for his execution. And that thereafter, and within the walls of the Southern Ohio Correctional Institution at Lucasville, Ohio, within an inclosure to be prepared for that purpose, under the direction of the Warden of said Institution and the Board of Managers thereof, on the 23rd day of April, 1976, and before the hour of 11:59 P. M. on said day, and according to law, the said George Washington Miller shall be electrocuted; and that the said Warden of said Institution or in case of his death, inability o.

-49-

absence, a deputy Warden, shall execute this death sentence at said time and place causing to pass through the body of said George Washington Miller, a current of electricity of such intensity as to cause death, and the application of such current shall be continued until the said defendant, George Washington Miller, is dead.

IT IS FURTHER ORDERED that the defendant, George Washington Miller, be imprisoned and confined in the Ohio State Penitentiary at Chillicothe, Ohio on Counts Two and Three of this Indictment for an indeterminate period of not less than six (6) years nor more than twenty-five (25) years, on each count, said counts to run consecutively to each other, in the event the death sentence were to be modified by any other authority.

IT IS FURTHER ORDERED that the defendant, George Washington Miller, pay the costs of this prosecution for which execution is hereby ordered.

JUDGE JOHN W. HENDERSON

JUDGE RICHARD T. COLE

JUDGE GERALD F. LORIG

APPROVED:

JAMES A. BERRY
PROSECUTING ATTORNEY

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IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : Case No. 1022

GEORGE WASHINGTON MILLER :

Defendant-Appellant :

.....

OPINION

Rendered on the 30th day of June, 1976.

.....

James A. Barry, Clark County Prosecutor, 10 West Columbia Street, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

Thomas H. Busch, Attorney at Law, 523 First National Bank Building, Springfield, Ohio 45502
Attorney for Defendant-Appellant

.....

KERNS, P. J.

The defendant, George Washington Miller, appellant herein, was tried by a three-judge court and found guilty of aggravated murder, aggravated robbery, and aggravated burglary. From the judgment and death sentence thereupon entered upon the verdict, Miller has perfected an appeal to this court.

On August 13, 1975, at approximately 2:40 a.m., the body of Shirley Craycraft, a night watchman and maintenance man, was found in the Twin Fair Discount Store on South Burnett Road in Springfield, Ohio. He had been violently beaten, shot, and killed. Miller was convicted of the murder, as well as robbery and burglary

In the present appeal, the appellant sets forth six assignments of error, the first of which challenges the admissibility of evidence presented by the prosecution.

Specifically, Miller contends that fingerprints found on a paper bag and on a hacksaw in the general area of the crime were inadmissible for the reason that the area was open to the public, and that the fingerprints "could have been placed by him upon these objects at any time up to one year prior to their discovery".

The evidence discloses that four gym bags were situated on the ground behind an adjacent store and that a fingerprint of Miller was found on a paper bag inside one of the gym bags. The gym bags contained merchandise of a type sold by the Twin Fair Store.

Another of Miller's fingerprints was found on a hacksaw in the storeroom. The saw was only about three feet from a lock that secured the door from which the robber exited. The hacksaw was new, and its package was nearby, but it did have metal filings on its teeth.

In consideration of the location of the items from which the prints were lifted, it cannot reasonably be argued that the fingerprints were not confined, pointed, and highly relevant, and there was no other basis for refusing this evidence. Hence, the fingerprints were admissible. As stated in State v. Hymore, 9 Ohio St. 2d 122, "where a particular fact tends to render probable a material proposition in issue then that fact is relevant". See

also, State v. Doll, 24 Ohio St. 2d 130. The first assignment of error is overruled.

The second assignment of error alludes generally to the admission of photographs which are characterized by the appellant as grisly, revolting, and inflammatory.

Ordinarily, slides or photographs are admissible if shown to be accurate reproductions and illustrative of verbal testimony. State v. Fugate, 36 Ohio App. 2d 131. And accurately portrayed, there is nothing pretty about any murder scene.

In the case of State v. Woodards, 6 Ohio St. 2d 14, the Supreme Court of Ohio commented upon the admission of fifteen color slides, as follows:

> "The rule is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray. Indeed, photographs frequently convey information to the court and jury more accurately than words. Although a photograph may be rendered inadmissible by its inflammatory nature, the mere fact that it is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury."

The same rule was applied by this court in the case of State v. Farley, 112 Ohio App. 448. See also, State v. McClellan, 6 Ohio App. 2d 155; State v. Viola, 51 Ohio Law Abs. 577. The second assignment of error is overruled.

The third, fifth, and sixth assignments of error are set forth by the appellant as follows:

> "3. That the judgment and finding is not sustained by sufficient evidence.

5. That the prosecution failed to prove the essential elements and specifications of Ohio Revised Code Section 2903.01(A),(B).

6. That the court erred in overruling defendant's motion for acquittal."

These alleged errors are not argued seriatim in the brief of the appellant, and as may be noted, all of them are directed, in one way or another, to the weight and sufficiency of the evidence.

Here, however, the record discloses sufficient evidence to sustain the finding of the three-judge court by the requisite degree of proof. Hence, this court may not interfere. 3 Ohio Jurisprudence 2d 821, Section 821; State v. DeHass, 10 Ohio St. 2d 230. The third, fifth, and sixth assignments of error are without merit and will be overruled.

The fourth, and only remaining, assignment of error is "that the judgment and finding and order of defendant's execution is unconstitutional in that it violates the constitutional rights of the defendant guaranteed by the Eighth and Fourteenth Amendments of the Constitution of the United States of America, and by Article I, Section 9 of the Constitution of Ohio".

On June 29, 1972, the United States Supreme Court held that the carrying out of a death penalty imposed at the discretion of the trier of the facts constitutes "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Furman v. Georgia, 403 U.S. 238. Thereafter, the Supreme Court of Ohio, as well as the highest courts in numerous other jurisdictions, modified death sentences to life imprisonment. Vargas v. Metzger, 35 Ohio St. 2d 116;

State v. Leigh, 31 Ohio St. 2d 97.

On January 1, 1974, a statutory procedure designed to escape the import of Furman was adopted by the Ohio General Assembl and in keeping with this procedure, a three-judge panel, under certain conditions, "shall impose sentence of death on the offender Section 2929.03, Revised Code.

In the present case, the record discloses that the court complied with the procedure to be followed in determining whether the sentence was to be life imprisonment or death. Hence, no error intervened in the cause under existing law, and the fourth assignment of error is overruled.

Many jurisdictions are presently awaiting word from the Supreme Court of the United States as to the constitutionality of the death penalty, and upon application, the execution of the death sentence in the present case will be stayed pending determination by that court as to whether the penalty, under any and all circumstances, is "cruel and unusual punishment". Otherwise, the judgment of the Court of Common Pleas will be affirmed.

SINNER and McBRIDE, JJ. concur.

.....

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	Case No. 1022
vs.	:	JOURNAL ENTRY
GEORGE WASHINGTON MILLER	:	
Defendant-Appellant	:	

Pursuant to the decision rendered by this court on June 30, 1976, the judgment of the Court of Common Pleas of Clark County is hereby affirmed.

_____

_____

_____

Dated: July 22, 1976

Copies mailed to:

James A. Berry, Clark County Prosecutor, 10 West Columbia Street, Springfield, Ohio 45502

Thomas H. Busch, Attorney at Law, 523 First National Bank Building, Springfield, Ohio 45502

Statement of the Case.

THE STATE OF OHIO, APPELLEE, v. MILLER, APPELLANT.

[Cite as State v. Miller (1977), 49 Ohio St. 2d 198.]

Criminal law—Aggravated murder—Circumstantial evidence—Fingerprints of accused—Sufficient to sustain conviction, when—Attendant circumstances—Sufficiency.

Fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction, where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime.

(No. 76-1002—Decided March 9, 1977.)

APPEAL from the Court of Appeals for Clark County.

On August 28, 1975, the Clark County grand jury charged George Washington Miller with the count of purposely causing the death of Shirley Crayeraft while committing aggravated burglary and aggravated robbery in violation of R. C. 2903.01. The first specification to that count stated that the offense was committed while Miller was committing aggravated robbery, and the second specification stated that the offense was committed while Miller was committing aggravated burglary.

The second and third counts of the indictment charged Miller with aggravated robbery and aggravated burglary, as defined by R. C. 2911.01 and 2911.11, respectively.

The record establishes the following facts:

At approximately 2:40 a. m. on August 13, 1975, the Springfield, Ohio, Police Department responded to a burglar alarm at the Twin Fair store at Burnett Road. The first officers at the scene saw four gym bags sitting in the driveway near the rear of the store. Finding the main overhead door at the rear of the store unlocked and slightly open, the officers entered. While checking the aisles, the officers came upon the body of Shirley Crayeraft, the

Statement of the Case.

store's maintenance man. A medical expert testified at the trial that Crayeraft died as a result of cerebral cranial injuries and gunshot wounds involving the head and neck. Apparently, there were no witnesses to the homicide.

Despite the fact that no stolen items from the Twin Fair store or murder weapons were found on Miller's person upon his arrest, the following objects found near the scene of the crime were directly linked to him through fingerprint analysis.

Inside one of the gym bags, found near the outside rear of the store, Miller's fingerprint was discovered on a paper sack filled with Twin Fair merchandise.

Near the overhead door at the rear of the store police found a hacksaw, the cardboard package it came in, saw blades, and two locks. Miller's fingerprint was found on the hacksaw blade and on the cardboard portion of the hacksaw display package. This cardboard package was originally sealed by protective plastic which had to have been removed to expose the package as it was found.

The two locks, used to secure the overhead door of the store from the inside, apparently were forced open by some tool or device. Although there were metal filings found in the teeth of the hacksaw blade, it is not clear whether the hacksaw was ever actually used on the locks to effect an apparent means of escape.

The store manager testified that each entrance and exit to his store was connected to an alarm system which was activated before closing time. Only Crayeraft would remain in the store when all the store entrances and exits were so locked or secured.

The store manager testified further that Miller worked at the Twin Fair store for about one month in 1972. Crayeraft was employed at Twin Fair during this same time.

Defense counsel introduced in evidence the testimony of two witnesses who testified that Miller was at their home on the night of the murder. However, it appears that both witnesses waited until the day of the trial to come forward

with such information. Also, one witness admitted that she had been convicted of the crimes of forgery, fraud, and petty larceny.

Miller, on direct examination, testified that sometime in July 1975, preceding the murder, he went to the Twin Fair store to purchase machinery or wood screws. Upon cross-examination, Miller testified that he could only recall handling the screws and was unable to explain how his fingerprint got on the saw blade or inside its display package.

Miller, having waived his right to a jury trial, was tried before a three-judge panel pursuant to R. C. 2945.06. On November 18, 1975, Miller was found guilty on each count and on the specifications. Following a psychiatric examination and pre-sentence investigation, a mitigation hearing was held. The three-judge panel, unanimously finding that none of the mitigating circumstances listed in R. C. 2929.04 (B) was established by a preponderance of the evidence, imposed the sentence of death.

The Court of Appeals affirmed the judgment of conviction and the sentence.

The cause is now before this court upon an appeal as of right.

Mr. James A. Berry, prosecuting attorney, for appellee.

Messrs. Acton, Dunn & Busch and *Mr. Thomas H. Busch*, for appellant.

SWEENEY, J. Appellant raises two issues in his first proposition of law.

Appellant proposes that fingerprints corresponding to those of the accused, found in a place where a crime was committed, upon objects always accessible to the public, and upon which fingerprints could have been impressed at any time, are without probative force unless the circumstances are proven beyond a reasonable doubt that the prints could have been made only at the time the crime was committed.

Opinion, per SWEENEY, J.

Ohio has not adopted such a strict standard for determining the admissibility of evidence as proposed by appellant. Rather, this court has stated that "evidence is admissible where it is of sufficient force that it logically tends to prove or disprove a fact or issue necessary to a decision in a particular case * * *." Paragraph three of the syllabus in *State* v. *Doll* (1970), 24 Ohio St. 2d 130. In the instant cause, Miller's fingerprints were discovered on a paper sack filled with Twin Fair merchandise found in one of the gym bags located in the driveway behind the store, on the blade of a hacksaw found near the overhead door, and on the cardboard backing of the hacksaw display package also found near the overhead door. These prints, in relation to the locations where they were discovered, were admissible in that they tended to prove Miller was at the scene of the crime and directly involved in its commission. Thus, appellant's argument concerning the inadmissibility of fingerprint evidence is not well taken.

Appellant proposes further that before fingerprint evidence may be used to support a conviction, such circumstantial evidence must exclude every other reasonable hypothesis except that of the defendant's guilt. While appellant's proposition is a correct statement of Ohio law (see paragraph six of the syllabus in *State* v. *Sheppard* [1956], 165 Ohio St. 293), it is this court's duty in reviewing a criminal case to confine its consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered. Paragraph five of the syllabus in *State* v. *Sheppard*, *supra*.

Appellant contends that the state has not proven beyond a reasonable doubt that he was the guilty party for the following reasons: (1) The state was unable to connect the defendant in any way with any of the tools allegedly used in the burglary, with the weapon used in the murder, or with any of the stolen merchandise; (2) no one could place defendant at the store at the time any of the crimes occurred; (3) the state offered no evidence establishing the time and circumstances in which the fingerprints were made; (4) the fingerprints were found on items on regular

public display, movable throughout the store; and (5) the fingerprints could have been made at any time up to six months or a year prior to the date of the identification.

The record indicates that Craycraft's assailant must have fled through an opening of the overhead door at the rear of the store by forcing open two locks securing that door. To the right of the door, and next to one of the broken locks, Miller's fingerprint was found on a hacksaw blade and on the inside portion of its display package.

Given the location of these objects, this court finds that there was sufficient evidence for the triers of fact to conclude that Miller, having no demonstrated access to such objects preceding the day of the crime, must have been the assailant who escaped through the opened overhead door.

Also, Miller's fingerprint was lifted from a paper sack inside one of the four gym bags filled with Twin Fair merchandise. From this evidence it was reasonable for the triers of fact to conclude that Miller, having collected various store items into these gym bags, carried the bags out of the store while effecting his escape.

In those jurisdictions where convictions were based largely, if not exclusively, on fingerprint evidence, the general rule has been developed in reviewing courts that fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime, 29 American Jurisprudence 329, Evidence, Section 358; 28 A. L. R. 2d 1150, Section 29.

In determining the sufficiency of the fingerprint evidence, a reviewing court must examine this evidence on a case-by-case basis.[1] The crucial issue is whether attendant

[1]Within the same jurisdiction, courts have reached different conclusions on the issue of sufficiency of the evidence with respect to fingerprint evidence, depending upon the particular circumstances of each

circumstances, such as the location of the accused's alleged fingerprint, the character of the premises where the print was found, and the accessibility of the general public to the object on which the print was impressed are sufficient to justify the trier of fact to conclude not only that the accused was at the scene of the crime when it was committed, but also that the accused was the criminal agent. See *Avent* v. *Commonwealth* (1968), 209 Va. 474, 164 S. E. 2d 655; *McCargo* v. *State* (1968), 3 Md. App. 646, 241 A. 2d 161, *certiorari denied* 394 U. S. 1008.

In the instant cause, although Miller's fingerprints were discovered on movable, retail items that are easily accessible to the public, such items were found either near the open overhead door at the rear of the store through which the assailant made his escape or just outside the rear of the store in the driveway.

This court concludes that there was sufficient substantial evidence for the triers of fact to conclude that Miller was the criminal agent of the crimes charged. The facts and evidence adduced herein are irreconcilable with any reasonable hypothesis other than Miller's guilt.

As his second proposition of law, appellant argues that his order of execution is unconstitutional in that the three-judge panel, pursuant to R. C. 2929.03, not only tried the charges and specifications against him, but also determined his sentence.

This argument is not well taken. The United States Supreme Court has upheld statutory schemes in which the finder of fact as to the guilt or innocence of the accused also determines the sentence. *Gregg* v. *Georgia* (1976), — U. S. —, 49 L. Ed. 2d 859; *Jurek* v. *Texas* (1976), — U. S. —, 49 L. Ed. 2d 929.

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case. See, *e. g.*, *Commonwealth* v. *Cichy* (1974), 227 Pa. Super. 480, 323 A. 2d 817; and *Commonwealth* v. *Hunter* (1975), 234 Pa. Super. 267, 338 A. 2d 623. See, also, *Hiet* v. *United States* (C. A. D. C. 1966), 365 F. 2d 504; *Stevenson* v. *United States* (C. A. D. C. 1967), 380 F. 2d 590; *Borum* v. *United States* (C. A. D. C. 1967), 380 F. 2d 595; and *United States* v. *Cary* (C. A. D. C. 1972), 470 F. 2d 469.

Appellant also challenges the validity of his execution order on the basis of the following portion of R. C. 2945.06, which states:

"* * * In rendering judgment of conviction of an offense punishable by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury * * *."

Appellant contends that this part of R. C. 2945.06 gives uncontrolled discretion to a trial court in affirming or disaffirming the death penalty, thus rendering Ohio's death sentencing laws unconstitutional. However, that portion of R. C. 2945.06, although not repealed, has, in effect, been declared unconstitutional in *State* v. *Leigh* (1972), 31 Ohio St. 2d 97, and has been superseded by R. C. 2929.03 and 2929.04 which pass constitutional muster. *State* v. *Bayless* (1976), 48 Ohio St. 2d 73.

Finally, appellant contends that since Ohio has not adopted a specific statutory scheme of review in death penalty cases similar to those found in the states of Georgia and Florida, its appellate review procedure fails to prevent the arbitrary and uneven imposition of the death penalty throughout the state. This argument is without merit.

The United States Supreme Court has never mandated a particular form of appellate review in death penalty cases. On the contrary, that court has recognized that prompt judicial review of cases involving the imposition of the death penalty by a court with statewide jurisdiction can provide "* * * a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." *Jurek* v. *Texas*, *supra* (49 L. Ed. 929), at page 941. Furthermore, as pointed out in *State* v. *Osborne* (1976), 49 Ohio St. 2d 135, 147, appeals from the imposition of death sentences are brought to this court as a matter of right. This statewide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty.

Dissenting Opinion, per W. Brown, J.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'Neill, C. J., Herbert, Celebrezze and Locher, JJ., concur.

W. Brown and P. Brown, JJ., dissent.

William B. Brown, J., dissenting. The majority upholds Miller's conviction of aggravated murder on the basis of circumstantial evidence which cannot support such a conviction because it does not exclude "every reasonable hypothesis except that of guilt." *State* v. *Urbaytis* (1951), 156 Ohio St. 271, paragraph three of the syllabus.

Although the prosecution submitted an abundance of exhibits indicating that a robbery, a burglary and a murder took place at the Twin Fair store in August 1975, its evidence against Miller is strictly circumstantial. That evidence includes Miller's fingerprint on one of approximatly eight Twin Fair paper sacks found in four gym bags located outside the store and on the hacksaw blade and its cardboard packaging found near the probable escape route. Such evidence indicates that Miller may have committed a robbery or burglary that night; but it does not directly tie Miller to the murder, and it does not exclude the possibility that someone else could have committed the crimes at the Twin Fair store.

One reasonable hypothesis consistent with Miller's innocence and with the evidence presented at trial is that Miller handled the paper sack and the hacksaw when he was in the hardware section of the Twin Fair store a few weeks before the murder. The paper sacks were accessible to the public, and, indeed, identifiable prints of persons other than Miller were found on the paper sacks left outside the store. The Twin Fair manager admitted that customers did break into packages of the type involved herein and that the policy of placing older items to the front of a display to encourage a quick sale was not strictly follow-

ed. The print left on the hacksaw package failed to disclose on Miller's thumb a cut that predated Miller's arrest and that should have shown up on a print left at the time of the crime. In addition, the hacksaw package contained unidentified prints other than the one found by the fingerprint expert to be Miller's.[1]

This court has not dealt with the sufficiency of *fingerprint* evidence to establish guilt until the present cause. However, we have held that circumstantial evidence in general is sufficient only if that evidence excludes every other reasonable hypothesis consistent with innocence, *Urbaytis, supra.* Because the paper sack, hacksaw blade and its package were accessible to the public (including Miller) *prior to* the murder, the fingerprints found on them do not exclude every hypothesis of his innocence. It is for precisely that reason that a number of other jurisdictions have held circumstantial fingerprint evidence insufficient to support a conviction unless they are found under circumstances which preclude their being made at any time other than the time the crime was committed. (See Annotation, Fingerprints, Palm Prints, or Bare Footprints as Evidence, 28 A. L. R. 2d 1115, Sections 28, 29 and 30.)

By affirming the trial court's determination, the majority professes to sanction, but does not actually apply, the approach of other jurisdictions to fingerprint evidence, undercuts the logic of this court's earlier decisions, and imposes the death penalty on evidence insufficient to sustain a conviction. For the foregoing reasons, I dissent.

P. Brown, J., concurs in the foregoing dissenting opinion.

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[1]Other evidence inconsistent with Miller's guilt included testimony (1) that the Twin Fair manager did not see him around the store at closing time; (2) that the police were unable to trace to Miller the bloody shirt and shoes presumably left by the murderer in effecting his escape; and (3) that Miller's fingerprints were not found on the hatchet used as a murder weapon, on the axe probably used to break the jewelry counters, on the door which the murderer opened in his escape, or on the stolen merchandise left outside the store.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5221

George Washington Miller,

Petitioner

-vs-

The State of Ohio,

Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

Attorneys - Respondent

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IN THE

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No. 77-5221

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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CITATION TO OPINION BELOW

The opinion of the Ohio Supreme Court is reported at 49 Ohio St. 2d 198 (1977).

JURISDICTION

Respondent does not have any question as regards the statement of jurisdiction as set forth in the Petition for writ of certiorari.

QUESTIONS PRESENTED

Respondent has no dispute with the questions as presented in petitioner's brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no authorities in addition to those of petitioner.

STATEMENT

At this time respondent has no material dispute with the petitioner's statement of the case, except that evidence which materially affects this Court's consideration of the first question, which testimony will be presented with the applicable rules of law.

ARGUMENT

I.

REVIEWING AND DETERMINING THE WEIGHT OF THE EVIDENCE IS NOT A UNITED STATES CONSTITIONAL QUESTION FOR WHICH CERTIORARI SHOULD BE GRANTED.

Petitioner correctly notes that in the instant case the Ohio Supreme Court correctly applied Ohio law to the issue of the sufficiency of the incriminating evidence; a rule of law in accord with the Ohio Constitution and derived from Ohio case law, not from the Constitution of the United States. The federal courts are in agreement that the Ohio rule which requires that before fingerprint evidence may be used to support a conviction, such circumstantial evidence must

exclude every other reasonable hypothesis except that of the defendant's guilt is not beyond the scope of permissible state dictates of proof sufficient to satisfy the requirements of due process.

In Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950) reh. denied, 340 U.S. 898 (1950), the court declared:

> The testimony of the fingerprint expert was sufficient to go to the jury if its nature was such that reasonable minds could differ as to whether inferences other than guilt could be drawn from it. It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of fact. at 393.

The Court of Appeals, Second Circuit has also unequivocally repudiated the view that as a constitutionally necessitated standard, circumstantial evidence is probatively inferior to direct evidence and that its sufficiency is, therefore, to be determined by a different, more strigent test, than the test required of direct proof.[1]

This Court has consistently declined to consider cases that have applied a more liberal evidentiary standard:[2]

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[1]United States v. Brown, 236 F.2d 403, 405 (2nd Cir. 1956), United States v. Becker, 62 F.2d 1008 (2nd Cir. 1933).

[2]Stopelli v. United States, supra; United States v. Valenti, 134 F.2d 362 (2nd Cir. 1943), cert. denied 319 U.S. 761 (1943); United States v. Manton, 107 F.2d 834 (2nd Cir. 1938), cert. denied 309 U.S. 664 (1939); United States v. Darsart Sportswear Inc., 169 F.2d 856 (2nd Cir. 1948) cert. denied sub nom, Deeb v. United States, 335 U.S. 884 (1948).

The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, ..., but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more. Holland v. United States, 348 U.S. 121, 140-141 (1954).

The Court has additionally remarked that a denial of certiorari is, in some cases, a significant indication of the Court's attitude about certain questions, United States v. Kras, 409 U.S. 434, 433 (1973), See also Willie Lee Richmond v. Arizona, -U.S.-, (Opinion of Mr. Justice Rehnquist as Circuit Justice, 9th Cir. August 8, 1977). However, more than mere inferences are available as to this Court's position on the sufficiency of circumstantial evidence. The court in Stoppelli v. United States found significant this Court's statement that:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.[3]

In Pierce v. United States, 252 U.S. 239, at 251-52 (1919) this Court declared that:

> The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

Petitioner does not contravene any of the above cited case law, but rather asks this Court to become a trier of fact, a task rejected by the opinion in Stoppelli v. United States, supra.

The Supreme Court of Ohio has ruled, after reviewing the evidence, that petitioner was properly convicted by proof beyond a reasonable doubt. Petitioner has not shown that the present Ohio evidentiary rule need be changed to satisfy the requirements of the due process clause of the

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[3]Tennant v. Peoria & P.U. Ry.Co., 321 U.S. 29, 35 (1943).

Fourteenth Amendment of the Constitution of the United States. Therefore, it is respectfully submitted that it would be inappropriate for the Court to grant certiorari on the basis of this state issue.

Petitioner, in addition, would have this Court believe that there was virtually no evidence against the petitioner other than his fingerprints (petitioner's brief, 9). This is not so. Bloody footprints were found around the body of the deceased (App. p.16, 17) which matched a pair of discarded tennis shoes found on a roof of a neighboring store (App. p.18). When he was arrested the petitioner was wearing a brand new pair of shoes of a kind carried by the store where the murder took place (App.19). The implication of this evidence is more fully shown when it is also known that in the shoe department of the store there was a rack capable of holding four pairs of men's shoes. Three pairs of shoes were found on the floor with the white plastic tags holding the shoes, as pairs, together, cut (App. p.19,20). The sizes of the remaining shoes were men's eight, nine, and ten (App. p.20). The shoes petitioner was wearing when arrested matched those still in the store as being of the same make; made in the same country, Spain; were of the same materials; and had the same manufacturer's identification number (App. p.21, 22, 23).

The petitioner testified that he had worn these shoes when he walked down a railroad tracks to work notwithstanding the fact that they were clean and showed no evidence of having been worn under such conditions as would be commonly found there, e.g., the ashes and creosote (App. p. 24, 25).

Also, the last time he was in the store where the murder took place, petitioner testified that he only handled the screws that were on display, not the hacksaw blades where his fingerprints were found (App. p.26). Petitioner also denied the correctness of the information the store manager had about his being employed the same hours of the victim, hours sufficient to know the victim's habits (App. p.27, 28).

The petitioner also presented an alibi and witnesses to support the alibi. Based on the verdict, the jury obviously did not believe the petitioner's assertions of being elsewhere when this crime was committed. The only other evidence of where he could have been was at the scene of the crime.

The petitioner is asking this Court to review the evidence in this case and determine its sufficiency. Such a task is not of constitutional proportions.

II.

The respondent would agree that the determination of the constitutionality of the Ohio death penalty statutes in this case will be governed by Bill v. Ohio, 48 Ohio St. 2d 270 (1976), cert. granted -U.S.- 96 S.ct. 2971 (1977).

However, respondent would not agree with the petitioner that the instant case presents questions of constitutional dimension that will not be addressed by this Court in Bell v. Ohio, supra. The three additional questions presented by petitioner vary from those in Bell v. Ohio, supra, only in phrasing of the issues and not as to significant constitutional law.

Respondent would respectfully urge this Court to not grant a writ of certiorari, because of these issues, because once Bell v. Ohio, supra, is decided, these questions will be moot.

III.

THE OHIO DEATH PENALTY STATUTES DO NOT VIOLATE EITHER THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE STATUTORY SECTIONS RELEVANT TO SENTENCING DO PERMIT PARTICULARIZED REVIEW OF THE OFFENDER AND THE CIRCUMSTANCES SURROUNDING THE CRIME.

The petitioner would object to the fact that the Ohio death penalty, sentencing, statutes[4] do not require the prosecutor to reprove the facts of the crime at the penalty stage of the proceedings. (Petitioner's brief, page 25). Section 2929.03 (C) Ohio Revised Code provides that the sentencing portion of the bifurcated proceeding be conducted and sentence pronounced by either the judge who tried the offender, when trial by jury is had, or by the same three judge panel that tried the offender when he waives trial by jury and is tried to the court.

Section 2929.03 (D) Ohio Revised Code, requires that a pre-sentence investigation be made and that a psychiatric examination of the offender be conducted; both reports are to be made to the court, with copies to the parties.

In considering whether or not mitigating circumstances exist, the court must consider "the nature and circumstances of the offense and the history, character, and condition of the offender."[5] Thus, the sentencing judge must focus on the

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[4]Ohio Revised Code Sections 2929.03 and 2929.04.

[5]Ohio Revised Code Section 2929.04 (B).

individual circumstances of each crime and each offender, overcoming the constitutional deficiences declared in Furman v. Georgia, 408 U.S. 238 (1972) that the death penalty could no longer be imposed in an arbitrary and capricious manner.

Judges, being more experienced in sentencing procedures, are better able to impose consistent sentences, Proffitt v. Florida, -U.S.-, 96 S.Ct. 2960, 2966 (1976). Analogous to this statement, and one which must be read in pari material with it, is that of Mr. Justice Rehnquist in Woodson v. North Carolina, -U.S.-, 96 S.Ct. 2978 (1976) (dissent), citing McGautha v. California, 402 U.S. 183 (1971):

> "The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalogue the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever really be complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need. 402 U.S., at 207-208 (citation omitted)" -U.S.-, 96 S.Ct. at 2999.

If judges are more qualified to sentence, then the rationality which states can attribute to juries who sentence can also be applied to judges.

The three judge panel in this case had heard all of the evidence, as to the merits, for and against the petitioner, prior to sentencing, they had already, themselves, found beyond

a reasonable doubt that the petitioner was guilty of the homocide and aggravating circumstances, what petitioner is asking is that the three judges should have told, by statute to set aside their previous verdict of guilt and hear the evidence anew to determine if there was any doubt in their minds.

The petitioner's argument would be more valid if the petitioner had been tried by a jury and sentenced by the court. In such a situation the judge could review for himself the weight of the evidence and give the weight he thought proper to any feelings he might that the verdict was not the proper one.

Gregg v. Georgia, -U.S.-, 96 S.Ct. 2909 (1976) does not constitutionally mandate a reargument of the merits of the case during the sentencing portion of the trial, contrary to the petitioner's citation. The portion of Mr. Justice White's opinion he cites, the respondent interprets as merely explaining the Georgia procedure.

The Ohio Supreme Court has also stated that all relevant factors are to be taken into consideration by the three judge panel or single judge when sentencing, State v. Bell, 48 Ohio St. 2d at 281, 282.

Therefore, as applied to petitioner and upon its face, the sentencing procedures in the Ohio capital punishment statutes are constitutionally valid.

IV.

THE OHIO DEATH PENALTY SCHEME IS NOT UNCONSTITUTIONAL, AS IT ALLOWS THE SENTENCING AUTHORITY TO REVIEW ALL RELEVANT EVIDENCE, BOTH IN MITIGATION OF THE DEATH PENALTY AND EVIDENCE IN FAVOR OF THE DEATH PENALTY, CONCERNING THE OFFENDER AND THE CRIME.

Petitioner first attacks the Ohio death penalty scheme as being unconstitutional on its face. Such an analysis does not withstand scrutiney in light of Jurek v. Texas, -U.S.-, 96 S.Ct. 2950 (1976), finding constitutional the Texas death penalty statutes.

Respondent would concede that Gregg v. Georgia, supra, and the cases decided subsequent to that case, all require that before a death penalty sentence can be constitutional, under the Eighth and Fourteenth Amendments of the Constitution of the United States, the sentencing authority must be allowed to focus on "'the circumstances of the offense together with the character and propensities of the offender,' Pennsylvania v. Ashe, 302 U.S. 51, 55" Gregg v. Georgia, -U.S.-, 96 S.Ct. at 2933.

This Court found the Texas statutory system constitutionally valid because, first, there had to be an aggravating circumstance found to exist by proof beyond a reasonable doubt; and, secondly, the jury had to answer three questions concerning the offender and his crime. When these two factors were taken together, they "guide[d] and focuse[d] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender." -U.S.-, 96 S.Ct. at 2957.

The Court, in Jurek v. Texas, supra, at 96 S.Ct. 2956 found that it was bound by the Texas Court of Criminal Appeals

interpretation of the mitigating factors. The Ohio Supreme Court has, as has the Texas court, determined to interpret broadly the evidence a defendant shall be allowed to put on in mitigation.

> The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. State v. Woods (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense is a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. Williams v. New York (1949). 337 U.S. 241, 247.
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> However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04(B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04(B) states that "the death penalty *** is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender" (emphasis added [by court]), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.
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> State v. Bell, 48 Ohio St. 2d, at 281.

This broad interpretation of the evidence allowed to be presented by the offender negates the petitioner's concern that the Ohio statutes are too narrowly drafted.

Petitioner secondly attacks Section 2929.04 (B)(3) Ohio Revised Code as being too narrow to permit individualized consideration of his mental status. This section provides:

> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. Ohio Revised Code Section 2929.04 (B)(3).

In construing the above subsection, the Ohio Supreme Court in State v. Bell, supra, at 282, held that considering the pre-sentence investigation by the probation department, psychiatrists, psychologists, and school authorities, which reports focused on the Bell's home life, his involvement with drugs, his inability to perform in school, and his age, there was insufficient evidence to establish mental deficiency. Even though the Ohio court rejected Bell's claim of mitigation, the courts of Ohio did take a broad range of factors into consideration before determining the sentence to be imposed, or affirmed.

The Ohio Supreme Court in State v. Black, 48 Ohio St. 2d 262 (1976), construed the phrase "psychosis" insufficient to establish the defense of insanity in the broadest terms possible. It said:

> It is clear that the General Assembly chose the emphasized language to allow the trial judge or panel the broadest possible latitude in the examination of the defendant's mental state and mental capacity for the purpose of the mitigation inquiry, excepting only legal insanity, the existence of which would have absolved the defendant from criminal responsibility for his crime. Thus, broadly defined and however evidenced, any mental state or incapacity may be considered in light of all the circumstances and including the nature of the crime itself so that it may be determined whether the condition found to have existed was the primary producing cause of the offense. To define terms such as those used in the statute is to narrow them.

> It has often been charged that our definition of legal insanity is too narrowly defined. For the appellant to claim that the mental state for purposes of the mitigation hearing also needs to be so defined, is to bind the conscience of the trial court initially, and of the appellate court and this court on review. The language used has a saving grace, for it will permit the examination of the mental state of the offender, whether juvenile, adolescent or adult, in light of the offense, the offender, and all of the circumstances of the crime, for the purpose of reaching a decision on humane grounds as to whether society needs to exact the ultimate penalty. at 268.

The petitioner cites State v. Bayless, 48 Ohio St. 2d 73, 96 (1976) for the proposition that the Ohio Supreme Court has adopted a narrow construction of the third mitigating factor. The psychiatric experts at the Bayless trial testified that Bayless was not psychotic, and was of normal or dull normal intelligence, but was not mentally limited so as to be retarded. They also testified that he was emotionally and culturally deprived, as well as being subnormal in his emotional control and conscience, State v. Bayless, supra at 94. It was this low-average person that the court said did not qualify as being mentally deficient or psychotic, short of insanity.

Additionally, petitioner's citation of Ohio cases not involved with the death penalty statutes is not on-point. State v. Henley, 15 Ohio St. 2d 86 (1968) questions the use of hearsay in the report of the psychiatric expert. State v. Jackson, 32 Ohio St. 2d 203 (1972), as far as the insanity issue is concerned, deals with the weight of the evidence the offender must (at that time) bear to prove the defense.

Finally, Fortune v. Reshetylo, 33 Ohio St. 2d 22 (1973), dealt with a defendant found to be insane at the time of trial and therefore unable to stand trial until sane. The issue decided was whether or not upon being found to have returned to sanity sufficient to stand trial and being found at trial not guilty by reason of insanity, was the defendant to be returned to the state hospital, as mandated by statute, to be re-examined prior to final release.

Petitioner's reading of the statute ignores the plain meaning of its wording, "insufficient to establish the defense of insanity." Based on the construction given this statute in Black, supra, respondent would assert that like Bayless, the petitioner did not show that he was psychotic or mentally deficient.

Finally, this same issue is presently before this Court in Bell v. Ohio, supra, and the Court's determination therein will be binding on this case.

C O N C L U S I O N

For the reasons more fully set forth hereinabove, a writ of certiorari should not be granted in the instant case.

Respectfully submitted,

James A. Berry
Clark County Prosecuting Attorney

PROOF OF SERVICE

I, James A. Berry, Prosecuting Attorney for Clark County, Ohio, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 1st day of September, 1977, I served copies of the foregoing Response in Opposition to Petition for Writ of Certiorari on Latham & Watkins, Max L. Gillam, 555 South Flower Street, Los Angeles, California 90071, Action, Dunn & Busch, Thomas H. Busch, First National Bank Building, Springfield, Ohio 45502, attorneys for petitioner, by mailing copies in duly addressed envelopes, with first class U.S. postage.

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A P P E N D I X

Note: The Appendix was not photographically reproducible.